decline to give the proposed instruction. *Transcript*, at 356-57.

There had already been a pretrial hearing, at which the judge had made it clear that his analysis of *the law* was quite different from that of the defense. Disagreements as to principles of law do not raise any concern as to inconsistent assertions of fact, and therefore, the military judge's expressed concern about an inconsistency in this case was entirely unfounded and without merit.

It is well-settled that the declaration of a mistrial "is a drastic remedy and should be granted only where the circumstances demonstrate 'a manifest necessity to terminate the trial to preserve the ends of public justice.'" *See*, e.g., *United States v. Dennis*, 16 M.J. 957, 965 (A.F.C.M.R. 1983); *United States v. Jeanbaptiste*, 5 M.J. 374, 376 (C.M.A. 1978). For example, where the receipt of improper evidence can be "neutralized by other means," a declaration of mistrial is not required. *Id.*

"Even when there are circumstances which raise serious doubt regarding the fairness of the proceedings, the trial judge must, before granting a mistrial, determine that an alternative measure, less drastic than mistrial, would not alleviate the problem so as to allow the trial to continue to an impartial verdict." *United States v. Ghent*, 21 M.J. 546, 550 (A.F.C.M.R. 1985). "[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

Where there *are* other alternatives to declaration of a mistrial, the declaration of mistrial is a judicial abuse of discretion and double jeopardy bars a retrial.

In the instant case, even assuming for the same of argument that the military judge was correct in his determination that he had to reject the Stipulation of Fact and set aside the Pretrial Agreement, he gave absolutely no thought to any other alternative way of dealing with the situation other than declaration of a mistrial.

The judge recognized that once the stipulation was set aside, the government would have no evidence on several of the charges because it would be caught without many of the witnesses it needed to establish the offenses. The judge did not even pause, however, to consider the possibility of recessing the trial, and resuming it at a later date when the government would have its witnesses available to testify.

After eliciting the defense position that it was opposed to a mistrial, the judge simply announced that the court's calendar was open on the week of March 19, 2007:

MJ: Defense, do you want to be heard?

CC: Yes. We would oppose the motion.

> MJ: Counsel, I have the week of 19 March available.

Transcript, at 374. There was absolutely no consideration of any other alternative besides declaration of a mistrial. The possibility of a trial continuance was never discussed.

This failure to recognize the viable alternative of a continuance is particularly egregious since the judge actually asked the Government if its witnesses would be available the week of March 19, 2007, and received an affirmative answer:

> MJ: At this point I won't set it for May 7th, I will set the initial date. And then I'll adjust, as every court does, for good cause shown. If you have a legitimate conflicts [sic]. That's just how the system works. ***Government, would you have your witnesses available the week of 19 March?***
>
> TC: ***Yes, Your Honor. I believe the Government can arrange witnesses for March 19th.***

Transcript, at 375 (emphasis added).

Thus, there was no consideration of the possibility of recessing and continuing the trial to the week of March 19, 2007. Indeed, the only reason the judge focused on the week of March 19th was that that week was open on the court's calendar.

It is entirely possible that the Government might have been able to get their witnesses into court much faster than that. Perhaps only a one or two week continuance would have been required. The answer will never be known because in his rush to simply declare a mistrial without considering any other alternative, the military judge never inquired at all about the possibility of a continuance, and never asked the Government when the earliest possible availability of its witnesses might be.

The military judge appears to have believed that Lt. Watada was confused, or that he somehow did not appreciate or understand the effect of his stipulation, even though counsel for both sides assured him there was ***no*** problem with the stipulation. Counsel for the accused told the military judge, "*there is nothing in the stipulation that is contradicted by the instruction that we're offering to you.*" *Transcript*, at 356.

When the judge pressed Trial Counsel to disagree, Trial Counsel replied simply, "*Government tends to agree that there is no contradiction in the stipulation.*" *Id.* The military judge continued to hammer away at counsel for the Government, and asked again if he did not see the inconsistent positions that the accused was taking. But Trial Counsel continued to assert that he did not see any problem, stating simply, "Your Honor, I don't see it." *Id.* at 366-67. Government counsel repeatedly agreed with civilian defense counsel, and repeatedly told the judge that he did not see any reason why the Stipulation of Fact was improper.

The judge simply declared a mistrial, without asking either party if they preferred for him to grant a continuance to give the Government a chance to assemble the witnesses needed to attest to the facts that had been covered in the Stipulation of Fact which the judge was now suddenly rejecting. In fact, the court never solicited any suggestions as to **any** other alternative to his declaring a mistrial.

Although Rule 915(a) specifically directs a military judge to consider the possibility of declaring only a *partial* mistrial, in this case the military judge never did this. The judge simply assumed that ***no*** part of the stipulation could be salvaged.

The Stipulation of Fact was entered into in exchange for the Pretrial Agreement, which called for dismissal of two of the four Conduct Unbecoming an Officer specifications. The military judge simply assumed that if the stipulation as to facts pertaining to the missing movement charge was rejected, that the parties would not want to adhere to any other part of their agreement.

It is entirely possible that notwithstanding invalidation of that part of the stipulation dealing with the missing movement charge, the Government and the defense might have been able to reconfigure the Stipulation in a manner that might have satisfied their purposes and satisfied the military judge that the outcome was just. In sum, there was never ***any*** consideration given as to whether it was truly necessary to declare a mistrial.

Not only was there no "high degree" of necessity for declaration of mistrial, *Arizona v. Washington*, *supra*, 434 U.S. at 506, there was absolutely ***no*** necessity at all.

It is important to note that even before the military judge committed himself to a declaration of a mistrial, Petitioner's Civilian Counsel put the judge on notice of the double jeopardy issue, and that a subsequent retrial might be barred. *Id.* at 359. Nonetheless, the military judge ignored the warning, and was undeterred.

F. THE MILITARY JUDGE'S RULING OF 11 JULY, 2007, DENYING THE DEFENSE MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS, PERPETUATES HIS MISUNDERSTANDING OF WHAT OCCURRED AT TRIAL.

The military judge's "Ruling of the Court" of 11 July, 2007 (hereinafter "Ruling") is plainly erroneous in its analysis, and, under the circumstances, contains a substantial element of retrospective self-serving assertions offered to defend his previous errors, including a reason (or reasons) never offered at the first trial.

Moreover, the Ruling misrepresents the entire state of the record at trial by taking somewhat out of context a fleeting remark made by Government counsel. At p. 4 of the Ruling, the military judge asserted that "the Government believed that the stipulation was also a confessional stipulation (ROT at 364), only changing its position when rejection of the stipulation appeared inevitable." The entire record, both before and after that moment at trial, shows quite the opposite.

In the pretrial hearing, the military judge went through a careful colloquy with Petitioner, and learned, for example, that while Petitioner agreed that every factual assertion in the Stipulation was true, Petitioner also believed the war was unlawful, and thus, his orders to deploy were likewise unlawful.

At pp. 6-11 above, the colloquy found at pp. 126-48 of the transcript is discussed, which makes clear that the judge was advised what Petitioner's position was, and also makes clear that the Government viewed the Stipulation as a Stipulation of Fact. The Government ***never*** indicated a belief that the Stipulation was confessional.

What the judge did say, however, was that a problem could arise in the future if Petitioner or his counsel brought up something inconsistent with what Petitioner stipulated to as the "***uncontradicted facts*** in this case." *Transcript* at 148 (emphasis added).

As shown at pp. 20 - 26 herein, discussing pp. 364-71 of the Trial Transcript, the Government was consistent in its view (as was Civilian Defense Counsel) that the stipulation was a Stipulation of Fact, and not a confessional stipulation.

For example, as noted above, the following exchanges took place at pp. 369-71:

> MJ: Mr. Seitz, defense counsel, one more time: Do you believe that Prosecution Exhibit 4 is a confessional stipulation, as to Charge 1?
>
> CC: ***No, I do not. I believe it's a stipulation of fact.***

> MJ: Government, I understand you needed some more time. Have you had enough time? Did you have the time that you needed?
>
> TC: We did, Your Honor. Thank you. ***The government concurs, and believes this also to be a stipulation of fact.***
>
> MJ: Does it not cover every element of the offense? Is this not a confessional stipulation of fact? How can I accept a confessional stipulation of fact under *Bertelson* where the defense doesn't concur that it's a confessional stipulation of fact?
>
> TC: The government's understanding is that it is a stipulation of fact; the accused has not pleaded guilty to the offense and ***if he [has] evidence to present that would be able to prove that he is not guilty of the offense, then the court should hear that evidence.***

Id. at 370-71 (emphasis added).

When counsel for the Government reiterated that he agreed with defense counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation - the parties agree that it is a stipulation of fact.***

Id. at 371 (emphasis added).

The Government never actually changed its position at trial. More important, however, is the fact that whatever Government counsel may have thought, the Government, right up until the last minute, saw no problem with the Stipulation as requiring its rejection and the revocation of the Pretrial Agreement.

Abundantly clear is that the Government believed the trial could and ***should*** proceed, and that whatever the defense may have thought, the Government recognized that Petitioner was simply trying to make a record for appellate review.

The military judge clearly has never understood the defense's position. First, it must be noted that contrary to the military judge's reference at p. 2 of the Ruling to "the opening of the defense's case," the defense never put on a case. The mistrial was declared after the Government had rested but before the defense had begun presenting its case.

What the judge may be referring to is that the defense gave an opening statement after the Government gave its opening statement, and before the Government called its first witness. Counsel's statement, of course, is not evidence, and it is clear that the panel never heard any evidence from the defense.

The Ruling derides the defense position about the relevance (or lack thereof) of the proposed instruction regarding "mistake of law/fact," and the significance the submission of the proposed instruction might have had with regard to creating an appellate record.

What the trial transcript shows quite clearly is that while there is no denying the fact that the military judge had previously determined that the order to move was a lawful order, and that the defense would not be permitted to put on evidence of the illegality of the war and thus that his order to deploy was an unlawful order, Petitioner simply ***disagreed*** with that conclusion, as did his Civilian Counsel, and, if convicted, intended to ask this Court and, perhaps, a higher court to review those decisions.

The essential premise of the Ruling is that because the military judge had previously ruled, Petitioner's refusal to accept and not contest that ruling represented a breach of the Pretrial Agreement. That premise, on one hand, is absurd, and on the other hand, supports the notion that the Stipulation could ***not*** have been confessional, as it did not admit an essential element of the charge.

The military judge's Ruling specifically lumped together what Petitioner stipulated to in the Stipulation with the court's earlier ruling that the order to deploy was lawful. The Ruling noted, at p.2:

> In the stipulation, satisfying element (1), the accused was manifested on the aircraft in question and the court had previously ruled that the order, if given, was lawful. Para. 4, AE XXIV and AE XXI, Watada I.

Clearly, the military judge's "previous ruling" that the order was lawful was not something that was "in the stipulation." Indeed, Petitioner repeatedly stated he ***disagreed*** with the military judge's ruling. Therefore, he obviously never ***stipulated*** to the court's ruling. By attempting to incorporate his own legal ruling into the Stipulation, the military judge appears to be attempting to avoid the fact that Petitioner never stipulated that he was "required in the course of duty" to obey the order to move with his unit.

Petitioner is not aware of any case that has held that a stipulation that does not expressly state agreement with a judicial ruling can somehow be deemed to include a stipulation to the correctness of that ruling. Thus, the military judge's effort to identify and locate all of the required elements of the charge(s) into the Stipulation, and thus label it "confessional," fails miserably.

Finally, the military judge professes, at pp. 5-6 of his Ruling, to be concerned with protecting Petitioner from himself and from being subjected to unfair treatment.

This attempted justification for the declaration of mistrial constitutes a perpetuation of the pretense that the military judge (and, presumably, the Government) were merely seeking to protect Petitioner's interests by refusing and ignoring his prerogative to complete the first trial. The effect of the military judge's handling of this matter, both at the time of the declaration of mistrial and with his Ruling, is to subject Petitioner to double jeopardy now, rather than respect his right to complete the first trial, on the utter speculation that he ***may*** have been convicted in the first trial and then tried again for the two specifications previously dismissed without prejudice.

III. CONCLUSION

For the reasons stated above, Petitioner urges this Court to grant his accompanying "Application for Stay of Trial Proceedings," so that this urgent matter may be decided by this Court without his having to suffer the very evil of an unnecessary and impermissible second trial the Double Jeopardy Clause and Article 44(a) of the UCMJ were designed to avoid.

Additionally, Petitioner urges this Court to grant his motion to dismiss all charges on the grounds that they are barred by double jeopardy, in that the military judge abused his discretion and the mistrial was declared without the required manifest necessity.

Finally, and alternatively, Petitioner moves for reconsideration of this Court's denial of his first Petition, on the grounds that the reason given for previously declining to take up that first Petition no longer exists.

DATED this 26th day of July, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By [signature]
James E. Lobsenz
Kenneth S. Kagan
Of Attorneys for Petitioner

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

First Lieutenant Ehren K. Watada,
United States Army,

Petitioner,

v.

Lieutenant Colonel John M. Head, Military Judge, Lieutenant General Charles H. Jacoby, Jr., I Corps, Fort Lewis, Washington (Convening Authority for General Court-Martial), the United States Army, and the United States,

Respondents.

Army Misc. Dkt. No. ________;

Army Misc. Dkt. No. 20070535;

BRIEF IN SUPPORT OF RENEWED PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION, AND, ALTERNATIVELY, MOTION FOR RECONSIDERATION, **AND APPLICATION FOR STAY OF PROCEEDINGS**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

James E. Lobsenz
Kenneth S. Kagan
Attorneys for Petitioner

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

I. PREAMBLE 1

II. RELIEF SOUGHT 1

III. STATEMENT OF THE CASE 2

A. EVIDENCE PRESENTED AT TRIAL BY THE GOVERNMENT 2

IV. ISSUES 6

V. ARGUMENT 6

A. A MISTRIAL MAY ONLY BE DECLARED WHEN MANIFEST NECESSITY REQUIRES IT, AND THERE IS NO LESS DRASTIC ALTERNATIVE AVAILABLE 6

B. ONCE THE JURORS HAVE BEEN SWORN, JEOPARDY HAS ATTACHED AND THE ACCUSED HAS A VALUED CONSTITUTIONAL RIGHT TO HAVE HIS TRIAL COMPLETED BEFORE THAT PARTICULAR JURY 8

C. TO AVOID A CONSTITUTIONAL BAR TO RETRIAL, THE PROSECUTION MUST CARRY A HEAVY BURDEN OF PROOF TO SHOW THAT THE ABORTION OF THE FIRST TRIAL WAS JUSTIFIED BY A HIGH DEGREE OF NECESSITY, IN ORDER TO AVOID THE RISK THAT THE GOVERNMENT GAINS AN UNFAIR ADVANTAGE IN IMPROVING ITS CHANCES OF CONVICTING THE ACCUSED 12

D. MANIFEST NECESSITY REQUIRES URGENT CIRCUMSTANCES. MERE ERROR BY THE PROSECUTION OR DEFENSE IS NOT ENOUGH 13

E. THERE WAS NO NECESSITY FOR DECLARATION OF A MISTRIAL ON ANY COUNT. THE STIPULATION WAS NOT A CONFESSIONAL STATEMENT 15

1. A Stipulation That Does Not Admit All of the Elements is Not a Confessional Statement. Moreover, Even if it Does Admit All the Elements, if the Defendant Presents Evidence

Page

of His Own, or if He Raises Some Other Issue Contesting the Allegation of Guilt, the Stipulation is Not a Confessional Statement 15

2. Missing Movement By Design Includes the Element of an Order for Which Compliance is "Required in the Course of Duty." Where There is No Such Duty, There Also is No Crime 16

3. Missing Movement By Design Includes an Element of Specific Intent 17

4. 1LT Watada Repeatedly Denied That He Was "Required in the Course of Duty" to Comply With the Order to Move. He Never Stipulated to this Element. On the Contrary, He Argued that He was Required by International Law and Treaty Obligations Not to Comply with the Order to Move 18

5. 1LT Watada Repeatedly Denied That He Had the Requisite Specific Intent to Miss a Movement Which was Required in the Course of Duty. He Insisted That His Intent Was to Abide By His Duty to Refrain From Committing a Crime Against Peace 20

6. Because Two Elements were Denied, the Stipulation of Fact Was Not a Confessional Statement, and No Bertelson Inquiry was Required 21

7. Because the Prosecution Presented Evidence on the Missing Movement Charge, This Indicates That the Stipulation Was Not a Confessional Statement 21

8. Because Petitioner Intended to Present Evidence on the Missing Movement Charge, and to Contest His Guilt, the Stipulation was Not a Confessional Statement. There was No Need to Conduct A Bertelson Inquiry, and No Need to Declare a Mistrial 22

Page

F. EVEN ASSUMING, ARGUENDO, THAT THE STIPULATION WAS A CONFESSIONAL STATEMENT AND THAT A BERTELSON INQUIRY WAS THEREFORE REQUIRED, THE JUDGE CONDUCTED A MORE THAN ADEQUATE BERTELSON INQUIRY, AND THERE WAS NO NEED TO REJECT THE STIPULATION 28

G. EVEN IF THE STIPULATION OF FACT WAS A CONFESSIONAL STATEMENT, A DEFENDANT NEED NOT AGREE WITH THE JUDGE'S INTERPRETATION OF THE LEGAL EFFECT OF THE STIPULATION; HE NEED ONLY UNDERSTAND IT, AND NEVERTHELESS WANT TO ENTER INTO IT. PETITIONER FULLY UNDERSTOOD BUT RESPECTFULLY DISAGREED WITH THE JUDGE'S LEGAL CONCLUSIONS AS TO THE EFFECT OF HIS STIPULATION 30

H. THE MILITARY JUDGE MISREPRESENTED THE RECORD. THERE WAS NO INCONSISTENCY OF FACT BETWEEN WHAT PETITIONER SAID AT THE START OF THE TRIAL OR IN HIS STIPULATION OF FACT ABOUT WHAT HAPPENED, AND THE SUBSEQUENT DEFENSE SUBMISSION OF A PROPOSED JURY INSTRUCTION IN A POINT OF LAW 31

I. EVEN IF THERE WAS SOME NEED TO REJECT THE STIPULATION, AND TO BRING BACK TWO OF THE DISMISSED CHARGES, THERE WAS STILL NO NEED TO DECLARE A MISTRIAL. A CONTINUANCE WOULD HAVE SOLVED THE PROBLEM. THE GOVERNMENT ACKNOWLEDGED IT COULD HAVE ALL OF ITS WITNESSES AVAILABLE BY MARCH 19, 2007. SUCH A CONTINUANCE WOULD HAVE ADDRESSED THE MILITARY JUDGE'S CONCERN AND ALSO PRESERVED THE PETITIONER'S VALUED RIGHT TO GO TO THIS PARTICULAR JURY FOR A FINAL DETERMINATION OF HIS GUILT OR INNOCENCE 33

J. THIS CASE IS SIMILAR TO JORN, WHEREIN THE COURT FOUND THAT THE TRIAL JUDGE ACTED PRECIPITOUSLY, WITHOUT CONSIDERING THE ASSURANCES OF COUNSEL THAT THERE WAS NO NEED FOR A MISTRIAL, AND WITHOUT CONSIDERING THE POSSIBILITY OF A CONTINUANCE 37

L. THE MILITARY JUDGE NEVER EVEN CONSIDERED THE POSSIBILITY THAT THE PARTIES MIGHT AGREE TO MODIFY

Page

THEIR STIPULATION OF FACT, SO THAT IT COVERED ONLY THE CONDUCT UNBECOMING AN OFFICER CHARGES. THUS, THE JUDGE NEVER CONSIDERED THE POSSIBILITY OF DECLARING ONLY A PARTIAL MISTRIAL 48

VI. CONCLUSION 50

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Page

Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) 8, 9, 12, 13, 22

Crist v. Bretz, 437 U.S. 28 (1978) 10, 11

Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) 10, 11, 13

Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) 9, 29

Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973) 10

New Hampshire v. Maine, 532 U.S. 742 (2001) 26

Pegram v. Herdrich, 530 U.S. 211, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000) 26

Serfass v. United States, 420 U.S. 377 (1975) 10

United States v. Dinitz, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976) 7, 13

United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) 8, 13, 37-40

United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824) 8, 13

Page

Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949) 8

FEDERAL CASES

Brandon v. Interfirst Corp., 858 F.2d 266 (5th Cir. 1988) 26

In re Superior Crewboats, Inc., 374 F.3d 330 (5th Cir. 2004) 26

Johnson v. Karnes, 198 F.3d 589 (6th Cir. 2000) 42, 45, 46

Love v. Morton, 112 F.3d 131 (3rd Cir. 1997) 42

Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996) 27

United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993) 26, 27

United States v. Rivera, 384 F.3d 49 (3d Cir. 2004) 41, 42, 46

United States v. Toribio-Lugo, 376 F.3d 33 (1st Cir. 2004) 42, 43

Walck v. Edmondson, 472 F.3d 1227 (10th Cir. 2007) 42

MILITARY DECISIONS

Burtt v. Schick, 23 M.J. 140 (C.M.A. 1986) 8

United States v. Augspurger, 61 M.J. 189 (C.A.A.F. 2005) 26

United States v. Beale, 7 C.M.R. 469 (C.G.B.R. 1953) 17

Page

United States v. Bertelson,
3 M.J. 314 (C.M.A. 1977) 16, 21, 22, 24, 28-31

United States v. Browers,
20 M.J. 542 (A.C.M.R. Rev. 1985) 12

United States v. Care,
18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) 31

United States v. Davis,
50 M.J. 426 (C.A.A.F. 1999) 22

United States v. Dennis,
16 M.J. 957 (A.F.C.M.R. 1983) 33

United States v. Donley,
33 M.J. 44 (C.M.A. 1991) 7

United States v. Epps,
25 M.J. 319 (C.M.A. 1987) 31

United States v. Foster,
3 C.M.R. 423 (1952) 18

United States v. Garces,
32 M.J. 345 (C.M.A. 1991) 7

United States v. Ghent,
21 M.J. 546 (A.F.C.M.R. 1985) 8, 33, 36, 37

United States v. Green,
1 M.J. 453 (C.M.A. 1976) 29

United States v. Harris,
51 M.J. 191 (C.A.A.F. 1999) 6, 7

United States v. Hinson,
7 C.M.R. 483 (1952) 17

United States v. Hutchinson,
49 M.J. 6 (C.A.A.F. 1998) 11

Page

United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978) 33

United States v. Kepple, 27 M.J. 773 (A.F.C.M.R. 1988), aff'd, 30 M.J. 213 (1990) 15, 21, 21, 30

United States v. Olsen, 24 M.J. 669 (A.F.C.M.R. 1987) 12

United States v. Pena, 48 M.J. 558 (A.F.C.C.A. 1998) 16

United States v. Ragard, 56 M.J. 852 (A.C.C.A. 2002) 11

United States v. Rempe, 49 C.M.R. 367 (A.F.C.M.R. 1974) 28

United States v. Rex, 3 M.J. 604 (C.M.R. 1977) 33

FEDERAL STATUTES

10 U.S.C. § 844(a) 6

OTHER AUTHORITIES

Manual for Courts Martial, ¶ 11.b, at p IV-15 16

Military Judges Benchbook, Para. 3-11-1, at p. 203 16

Military Judges Benchbook, Para. 3-11-1, at p. 204 18

Uniform Code of Military Justice, Article 44(a) 6

Uniform Code of Military Justice, Article 45(a) 29

Uniform Code of Military Justice, Article 87 .... 16, 17, 18, 20

Page

Double Jeopardy Clause, Fifth Amendment,
United States Constitution .... *passim*

I. PREAMBLE

COME NOW the undersigned defense counsel on behalf of the Petitioner, First Lieutenant (hereinafter "1LT") Ehren K. Watada, and, pursuant to Rules 2(b) and 20 of this Court's Rules of Practice and Procedure, submit this Brief in Support of the accompanying "Renewed Petition for Extraordinary Relief in the Nature of a Writ of Prohibition, and Alternatively, Motion for Reconsideration, and Application for Stay of Proceedings." Petitioner requests that this Honorable Court grant a Writ and order Respondents to dismiss with prejudice all charges pending against Petitioner.

II. RELIEF SOUGHT

More particularly, Petitioner moves this Court for Orders:

1. Granting Petitioner's Application for an immediate Stay of all Trial Proceedings below;
2. Holding that because the military judge's February 7, 2007 declaration of mistrial was not supported by the constitutionally-required "manifest necessity," a second trial would violate the Double Jeopardy Clause of the United States Constitution and Article 44 of the Uniform Code of Military Justice;
3. Prohibiting any further pretrial proceedings and trial proceedings (assembly of a court-martial panel is currently scheduled to commence on 9 October, 2007,

2007); and

4. Directing the Convening Authority and/or the military judge to dismiss with prejudice all the charges pending against Petitioner.

III. STATEMENT OF THE CASE

Petitioner adopts by reference the "Statement of the Case" as set out at pages 5-40 in the accompanying "Renewed Petition for Extraordinary Relief in the Nature of a Writ of Prohibition, and Alternatively, Motion for Reconsideration, and Application for Stay of Proceedings" of this date.

In addition to what was set out in the Renewed Petition, the following may be germane to this Court's consideration.

A. EVIDENCE PRESENTED AT TRIAL BY THE GOVERNMENT

At trial, the Government's case consisted of the testimony of three witnesses. First, Lieutenant Colonel (hereinafter "LTC") Bruce Antonia, the Battalion Commander for the 5th Battalion, 20th Infantry Regiment, testified that prior to deploying to Iraq in June of 2006, 1LT Watada was in his battalion. *Transcript*, at 271-73. In January of 2006, 1LT Watada gave LTC Antonia a copy of a letter he had written to Colonel Stephen Townsend, in which he discussed his reservations about the United States going to war in Iraq. *Id.* at 274. In March, 2006, LTC Antonia learned that 1LT Watada was planning to make public statements about the war, and he counseled 1LT Watada as to what he could and could not say.

Id. at 276.

LTC Antonia was dismayed when he learned that 1LT Watada had said he would rather go to jail than serve in what he considered to be an illegal war. *Id.* at 277. He told 1LT Watada that he was concerned about his making such a statement because he was concerned about the morale of the Battalion on the eve of its deployment to Iraq. *Id.*

LTC Antonia urged 1LT Watada not to make any public statements, and told him that if he was going to make a statement, he had to do so while off-duty, he had to do so while not in uniform, and he had to do it in a manner that was respectful and not contemptuous of the Secretary of Defense, the President and the armed forces. *Id.* at 293. He did not, however, forbid 1LT Watada from making any public statements. *Id* at 294.

LTC Antonia acknowledged that every soldier who is given an order "has an obligation to determine for himself whether it is a legal order," and that he expects every soldier under his command to make that determination. *Id.* at 297. He further acknowledged that if a soldier determined that an order was illegal, he would expect the soldier not to obey it. *Id.* at 298.

LTC Antonia confirmed that up until January of 2006, he always found 1LT Watada to be a quality officer, and a hard working, good officer. *Id.* at 282. Although 1LT Watada told his commanding officer about his decision not to deploy to Iraq, LTC

Antonia never had any indication that he was talking to other soldiers about his growing concerns about the legality of the war. *Id.* at 285. He acknowledged that 1LT Watada did offer to go to Afghanistan instead of to Iraq. *Id.* at 291.

Finally, LTC Antonia testified that 1LT Watada did not deploy to Iraq. *Id.* at 280. But when asked whether, "as a consequence of 1LT Watada's action and statements, did anyone else in your unit fail to deploy or carry out any orders required of them?" he replied, "No. Everyone else obeyed their orders." *Id.* at 304. At the request of a panel member, the military judge questioned LTC Antonia further as to whether there was any negative impact on his unit:

> Q. What objective impact, if any, did you observe in the battalion as a result of the accused's comments? What did you personally observe?
>
> A. To tell you the truth, it didn't have huge impacts. It was simply talk about what leaders should not say. That's basically it.
>
> Q. So, if I re-ask the question a slightly different way. Did this have an impact on your unit? Any impact?
>
> A. It did not have an impact in the way we might be asking ourselves. Did it have an decrease moral [sic]? Did it decrease the effectiveness of the unit? No. The impacts we had were we had a leader in the battalion; every one of my soldiers saw this leader in the battalion, who was making - I know not [sic] allowed to say it, but I heard more than one soldiers say that -
>
> [OBJECTION, followed by colloquy, and no definitive ruling on the objection was ever made.]

Id. at 307-08.

The Government also presented the testimony of Richard Swain, a Professor of Officership at the William E. Simon Center for the Professional Military Ethic. *Id.* at 315. The Army offered him as an expert on military ethics and officership customs and standards. *Id.* at 320. He testified that he teaches officers about their oath to support the Constitution. *Id.* at 322. In his opinion, the essence of officership is conducting oneself in a manner consistent with that oath. *Id.* at 323.

On cross-examination, Professor Swain acknowledged that he teaches officers that in the military, both by tradition and as a principle written into every officer's commission, officers are "not under an obligation to obey illegal orders." *Id.* at 330. Thus, Professor Swain actually *supported* the central thrust of 1LT Watada's defense to the charge of missing movement through design.

Finally, the Government presented the testimony of LTC William James, the Deputy Brigade Commander for the 1st Battalion, 25th Infantry. *Id.* at 334. He counseled 1LT Watada on his request for resignation. *Id.* at 337. LTC James testified that 1LT Watada's public statements about the war caused him to question his suitability for leadership, and his "morality." *Id.* at 341-42. He, too, was asked whether the statements made by the accused interfered with the orderly deployment of the unit, and he answered, "It did not directly interfere; it did not create obstacles, but it did cause some disruption, yes." *Id.* at 343.

As noted in the Renewed Petition, at 15:43 on February 6, 2007, the Government rested its case. *Id.* at 353.[1]

IV. ISSUES

1. WHETHER, FOR THE REASONS SET OUT BELOW, THE MILITARY JUDGE ABUSED HIS DISCRETION BY DECLARING A MISTRIAL OVER THE OBJECTION OF THE ACCUSED; and

2. WHETHER A SECOND TRIAL OF THE PENDING CHARGES AGAINST PETITIONER IS NOW BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, AS WELL AS ARTICLE 44 OF THE UNIFORM CODE OF MILITARY JUSTICE, AND RULES FOR COURTS-MARTIAL 915 (c)(2).

V. ARGUMENT

A SECOND PROSECUTION OF 1LT WATADA IS BARRED BY THE FIFTH AMENDMENT AND U.C.M.J. ARTICLE 44, IN THAT THE MILITARY JUDGE ABUSED HIS DISCRETION IN DECLARING A MISTRIAL DURING THE FIRST PROSECUTION, AND MADE SUCH DECLARATION WITHOUT THE CONSENT OF 1LT WATADA.

A. A MISTRIAL MAY ONLY BE DECLARED WHEN MANIFEST NECESSITY REQUIRES IT, AND THERE IS NO LESS DRASTIC ALTERNATIVE AVAILABLE.

As the Court of Appeals for the Armed Forces noted in *United States v. Harris*, 51 M.J. 191 (C.A.A.F. 1999), declaration of a mistrial must be viewed through the prism formed by the Double Jeopardy Clause of the Fifth Amendment; Article 44(a) of the UCMJ [10 U.S.C. § 844(a)]; and RCM 915. The Double Jeopardy Clause and UCMJ 44(a) are designed to protect the accused against repeated attempts to try an individual for the same offense, including subjecting the accused to the embarrassment, expense, and ordeal

---

1 TC: Your Honor, at this time the government rests.
MJ: You have no more evidence to present at this time?
TC: That's correct, Your Honor.

of a second trial.

RCM 915(a) holds in pertinent part that a mistrial may be declared in the discretion of the military judge "when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

On the other hand, the *Harris* Court also noted that for a military judge to declare a mistrial is "a drastic remedy," which should be used only when necessary "to prevent a miscarriage of justice." *See*, also, *United States* v. *Garces*, 32 M.J. 345, 349 (C.M.A. 1991).

Among the many factors for the judge to consider, in determining whether or not to declare a mistrial, the *Harris* Court, citing *United States v. Donley*, 33 M.J. 44, 47 (C.M.A. 1991), indicated in addition to considering potential alternative remedies, the most important consideration is the desire of, and the impact on, the accused. It is the accused who "retain[s] primary control over the course to be followed in the event of" trial errors. *See*, also, *United States* v. *Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

When trial is terminated over defense objection, as was done here, the Government has a heavy burden of showing "manifest necessity" for the mistrial in order to remove the double jeopardy bar to a second trial. *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1978).

For this reason, a military judge contemplating the declaration of a mistrial over the objection of the defense must approach the use of this power "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Burtt v. Schick*, 23 M.J. 140, 142 (C.M.A. 1986), citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824).

If a judge has a doubt about the fairness of a trial, before declaring a mistrial, the trial judge must determine that "an alternative measure, less drastic than mistrial, would not alleviate the problem so as to allow the trial to continue to an impartial verdict." *Burtt v. Schick, supra*, 23 M.J. at 142; *United States v. Ghent*, 21 M.J. 546, 550 (A.F.C.M.R. 1985). *See*, also, *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

B. ONCE THE JURORS HAVE BEEN SWORN, JEOPARDY HAS ATTACHED AND THE ACCUSED HAS A VALUED CONSTITUTIONAL RIGHT TO HAVE HIS TRIAL COMPLETED BEFORE THAT PARTICULAR JURY.

In addition to protecting a defendant against a second trial following an acquittal, the Fifth Amendment prohibition against double jeopardy protects a criminal defendant's "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949).

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, *supra*, 434 U.S. at 503-04.

As the Supreme Court stated in *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The *Green* Court emphasized that this vital constitutional right is not to be given a narrow, grudging application, for that would deprive the right of its great significance. *Id.* at 198. "The right not to be place in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and that should continue to be highly valued." *Id.*

A trial judge's decision "to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one…" *Illinois v. Somerville*, 410 U.S. 458, 471, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). "Nor will the lack of demonstrable additional prejudice preclude the defendant's invocation of the double jeopardy bar in the absence of some important countervailing interest of proper judicial administration." *Id.*

Lest there be any doubt, it has been the settled rule for ***decades*** that jeopardy automatically attaches at the point at which jurors, or, in this case, the panel members, have been sworn in. More than 30 years ago, the United States Supreme Court specifically held: "In the case of a jury trial, jeopardy attaches when a jury is empanelled and sworn." *Serfass v. United States*, 420 U.S. 377, 388 (1975), citing *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) and *Illinois v. Somerville, supra*.

The same rule was emphatically reaffirmed in *Crist v. Bretz*, 437 U.S. 28 (1978), in which the Supreme Court *rejected* the contention of a State that this rule of automatic jeopardy attachment was not an integral part of the Fifth Amendment protection against double jeopardy.

> The precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100. [Footnote omitted]. There the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn

> and before any testimony had been taken. ***The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the Downum case has since been understood as explicit authority for the proposition that jeopardy attached when the jury is empanelled and sworn.*** [Citations omitted].
>
> The reason for holding that jeopardy attaches when the jury is empanelled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury.

Crist, supra, 437 U.S. at 35 (emphasis added).

Furthermore, the *Crist* decision expressly rejected the argument that this rule (i.e., identifying when jeopardy attaches) was not part of the protection guaranteed by the Double Jeopardy Clause of the Fifth Amendment.

> [T]he federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns…
>
> …Today we explicitly hold…: ***The federal rule that jeopardy attaches when the jury is empanelled and sworn is an integral part of the constitutional guarantee against double jeopardy.***

Crist, 437 U.S. at 37-38 (emphasis added).

Since the decision in *Crist,* all courts, including this Court, have dutifully followed and applied that rule. *See, e.g., United States v. Ragard*, 56 M.J. 852, 855 (A.C.C.A. 2002) ("In the case of a jury or members trial, jeopardy attaches when a jury or court-martial panel is empanelled and sworn."); *United States v. Hutchinson*, 49 M.J. 6, 7, n.4 (C.A.A.F. 1998); *United States v.*

Browers, 20 M.J. 542, 553 n.11 (A.C.M.R. Rev. 1985); *United States v. Olsen*, 24 M.J. 669, 670 (A.F.C.M.R. 1987).

C. **TO AVOID A CONSTITUTIONAL BAR TO RETRIAL, THE PROSECUTION MUST CARRY A HEAVY BURDEN OF PROOF TO SHOW THAT THE ABORTION OF THE FIRST TRIAL WAS JUSTIFIED BY A HIGH DEGREE OF NECESSITY, IN ORDER TO AVOID THE RISK THAT THE GOVERNMENT GAINS AN UNFAIR ADVANTAGE IN IMPROVING ITS CHANCES OF CONVICTING THE ACCUSED.**

In order to avoid a double jeopardy bar to retrial, a heavy burden of proof lies on the prosecution to justify the declaration of mistrial:

> [The accused's] valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the mistrial, ***the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one.*** The prosecution must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Arizona v. Washington, *supra*, 434 U.S. at 505 (emphasis added).

The words "manifest necessity" aptly "characterize the magnitude of the prosecutor's burden." *Id.* The Supreme Court requires "a 'high degree' [of necessity] before concluding that a mistrial is appropriate." *Id.* at 506.

The double jeopardy clause bars retrials where "bad faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz, supra*, 424 U.S. at 611.

"Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). The prohibition against double jeopardy unquestionably "forbids the prosecutor to use the first proceeding as a trial run of his case." *Arizona v. Washington, supra*, 434 U.S. at 508, n. 24.

> The "particular tribunal" principle is implicated whenever a mistrial is declared over the defendant's objection and without regard to the presence or absence of governmental overreaching. If the "right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury."

Arizona v. Washington, 434 U.S. at 508, *quoting United States v. Jorn, supra*, 400 U.S. at 485.

D. MANIFEST NECESSITY REQUIRES URGENT CIRCUMSTANCES. MERE ERROR BY THE PROSECUTION OR DEFENSE IS NOT ENOUGH.

The power to declare a mistrial and thus deprive the defendant of his right to have his case resolved by the particular jury at hand "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes…" *United States v. Perez, supra*, 22 U.S. at 580.

In the instant case, there was no error by any party other than the military judge. The prosecution committed no error, nor did the defense. Nothing the prosecution did, and nothing the defense did, invited an error that justified the judge in seeking to preserve the fairness of the trial by declaring a mistrial.

The judge's lack of understanding of the significance of what he was doing is evident from:

1. The fact that the judge seemed not to recognize that the double jeopardy issue was looming [*see* the accompanying Renewed Petition, "Statement of the Case," pages 16-17 therein, citing the *Transcript* at pp. 358-59];
2. The fact that all the judge could think of was docketing the case for a subsequent trial at a time when his calendar permitted it, not comprehending that declaring a mistrial would have the immediate effect of withdrawing the affected charges and specifications, requiring that they be re-referred after consideration by the Convening Authority [see RCM 915(c)(1)]; and
3. The fact that the judge did not offer the parties the opportunity to find a solution to the dilemma created by the judge (such as re-negotiating the Stipulation of Fact, or continuing the matter in such a way as to preserve the accused's right to have the matter considered by the same panel).

E. **THERE WAS NO NECESSITY FOR DECLARATION OF A MISTRIAL ON ANY COUNT. THE STIPULATION WAS NOT A CONFESSIONAL STATEMENT.**

1. **A Stipulation That Does Not Admit All of the Elements is Not a Confessional Statement. Moreover, Even if it Does Admit All the Elements, if the Defendant Presents Evidence of His Own, or if He Raises Some Other Issue Contesting the Allegation of Guilt, the Stipulation is Not a Confessional Statement.**

The judge declared a mistrial after erroneously concluding that he had to reject Petitioner's Stipulation of Fact, which he had previously accepted at the start of the trial. The judge's erroneous belief that he had to reject the Stipulation was predicated upon two erroneous assumptions.

First, he mistakenly concluded that the Stipulation of Fact constituted a confessional statement. Second, he mistakenly believed that Petitioner had made some representation that was inconsistent with the ***facts*** in the Stipulation. Because the judge was mistaken in these assumptions, his conclusion that he had to reject the Stipulation was flawed, and the declaration of mistrial was entirely unnecessary.

As the Court held in *United States v. Kepple*, 27 M.J. 773 (A.F.C.M.R. 1988), *aff'd*, 30 M.J. 213 (1990): "Unless the stipulation itself admits every element and no further evidence is required from the Government for a finding of guilty, the stipulation is not 'confessional' and a *Bertelson*[2] inquiry is not mandatory." 27 M.J. at 779.

Similarly, in *United States v. Pena*, 48 M.J. 558 (A.F.C.C.A. 1998), the accused, charged with forgery and larceny, admitted to committing the physical acts she was accused of, but did not admit to the requisite intent. Consequently the appellate court held that the stipulation was not confessional, and that a *Bertelson* inquiry was not required.[3]

2. **Missing Movement By Design Includes the Element of an Order for Which Compliance is "Required in the Course of Duty." Where There is No Such Duty, There Also is No Crime.**

Article 87 provides:

> Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which ***he is required in the course of duty*** to move shall be punished as a court-martial may direct. (Emphasis added.)

The existence of a movement which is "required in the course of duty" is the first of four elements of the offense. *Manual for Courts Martial*, ¶ 11.b, at p. IV-15; *Military Judges Benchbook*, Para. 3-11-1, at p. 203. Appellate courts have not hesitated to reverse and dismiss missing movement convictions where the evidence of a duty was insufficient.

---

[2] *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977)

[3] "[Defense] counsel described the stipulation as follows: 'It's close to a confessional stip. We basically admit to all of the physical acts. We just do not believe that certain elements, i.e., intent, have been proved in each and every instance.' As the trial defense counsel stated this was not a confessional stipulation. ***The absence of one element means it is not a confessional stipulation***. This asserted error is without merit." *Pena*, 48 M.J. at 561-62 (emphasis added), *citing Kepple*, 27 M.J. 773 (A.F.C.M.R. 1988).

For example, in *United States v. Beale*, 7 C.M.R. 469 (C.G.B.R. 1953) the Court reversed and dismissed the accused's Article 87 conviction because the record contained insufficient evidence to show the existence of a duty to be on board the ship in question. The problem was that evidence in the record was insufficient to establish that Beale had a duty to make the movement. *Beale*, 7 C.M.R. at 470.

Similarly, in *United States v. Hinson*, 7 C.M.R. 483 (1952), the appellate court reversed and dismissed a missing movement conviction because there was insufficient evidence that the accused was assigned to any duty on the particular plane whose flight he missed. Although a particular commercial airplane was designated as one on which the accused could travel as a passenger, the plane was not a military plane to which he was assigned, and therefore the requisite military duty to be on that particular plane was lacking. *Hinson*, 7 C.M.R. at 487-88.[4]

3. **Missing Movement By Design Includes an Element of Specific Intent.**

Missing movement through design is a specific intent crime.

---

[4] 1LT Watada does not contend that the evidence of "a requirement in the course of duty" in his case was legally insufficient to support a conviction. Had the military judge allowed the trial to proceed to conclusion, and if a finding of guilty had been made, Petitioner would not be contending that the evidence presented by the Government was legally insufficient to support a finding that he missed a movement which was "required in the course of duty" element of the crime. But Petitioner is contending that he never stipulated to this element. One can scour the entire Stipulation of Fact, and nowhere in it does it contain any admission that this element was established.

The jury at a court-martial proceeding must be instructed that proof of specific intent is required. *See, e.g., United States v. Foster*, 3 C.M.R. 423, 426-27 (1952) ("no evidence was adduced to show any specific intent or design of the accused;" the accused "was entitled in our opinion to have the court clearly instructed that…'design' connoted a specific intent plus overt act or acts directly related to the movement actually missed").

Similarly, as noted in the *Military Judge's Benchbook*, when a violation of Article 87 by design is charged, the court is ***required*** to instruct the jury on the definition of the words "through design" as follows:

> "Through design" means on purpose, intentionally, or according to plan and ***requires specific intent*** to miss the movement.

Military Judges Benchbook, ch. 3, Para. 3-11-1, at p. 204 (2002).

4. **1LT Watada Repeatedly Denied That He Was "Required in the Course of Duty" to Comply With the Order to Move. He Never Stipulated to this Element. On the Contrary, He Argued that He was Required by International Law and Treaty Obligations *Not* to Comply with the Order to Move.**

As noted, 1LT Watada stipulated that he deliberately missed his movement, but he did ***not*** stipulate that the order to move was one "required in the course of duty." On the contrary, he argued strenuously that given his sworn oath and duty to uphold the Constitution, he had a duty ***not*** to comply with this order because it was illegal, and therefore compliance with the order to move was ***not*** "required in the course of duty."

1LT Watada further argued that because his motive was to avoid obeying an unlawful order, he did **not** have the specific intent to disobey an order for which compliance was "required in the course of duty," and he specifically denied that he had any such duty:

> MJ: So when you talk about you intentionally missed this movement, ***did you believe you had a duty*** to make that movement?"
>
> ACC: Your Honor, ***no. I did not feel I had that duty, because I was being ordered to do something I felt was illegal.***

Transcript, at 362 (emphasis added). Thus, he specifically disputed the duty element of the offense.[5]

As noted in the *Military Judges' Benchbook*, ch. 3, para. 3-23-3, at p. 336 (2002), "the prosecution must prove a duty and the failure to do the duty." In the instant case, Petitioner's admissions in the Stipulation of Fact did not mention the existence of any duty. 1LT Watada never stipulated that he had a duty to move with his unit. Thus, there was no admission to the required element of duty, and Petitioner ***specifically refused*** to enter into any such stipulation, steadfastly maintaining instead that his decision to miss the movement was the right thing to do. Thus, Petitioner also refused to stipulate that he had the requisite specific intent to commit the crime.

---

5 Professor Swain, the Government's expert, *agreed* with the defense that the accused was "not under an obligation to obey an illegal order." *Id.* at 330.

In the instant case, as in *Kepple, supra*, given Petitioner's very clear statements on the record, "surely no one thought that the accused was conceding guilt as to the crime" charged. *Kepple*, 27 M.J. at 779. "A stipulation is not one which practically amounts to a confession if the defendant contests an issue going to guilt which is not foreclosed by the stipulation." *Id.* at 780. Here, Petitioner vigorously contested his guilt on *all* charges and nothing in his Stipulation precluded him from contesting the duty element of the missing movement offense.

5. **1LT Watada Repeatedly Denied That He Had the Requisite Specific Intent to Miss a Movement Which was Required in the Course of Duty. He Insisted That His Intent Was to Abide By His Duty to Refrain From Committing a Crime Against Peace.**

As noted above, Petitioner repeatedly denied that he had the specific intent to refuse to obey an order to move which was required in the course of duty. On the contrary, he steadfastly maintained that his duty was to the Constitution, and that because the war was an illegal war, he had a duty ***not*** to obey the order to move. He maintained that "each individual soldier" who receives "orders to do something has an obligation, by virtue of their training, by virtue of their oath, by virtue of applicable law, to make a determination whether the orders that he or she receives are lawful…" *Transcript*, at 74.

Petitioner consistently argued that he did not have the specific intent to violate Article 87, because his motive for not obeying the order was that the order was not lawful, and thus he had "a requirement that he take the action that he did in order to a avoid committing a higher offense." *Id.* at 79. Before the military judge accepted the Stipulation, Petitioner told him that he believed that the order to move "was an illegal order. And that the war itself was illegal, and any participation of mine would be contrary to my oath…" *Id.* at 135.

6. **Because Two Elements were Denied, the Stipulation of Fact Was Not a Confessional Statement, and No *Bertelson* Inquiry was Required.**

A stipulation is a confessional statement, and triggers the need for *Bertelson* inquiry, only if the stipulation admits all the elements of the charged offense. *Kepple, supra*, 27 M.J. at 779. Since Petitioner denied not one, but *two* of the elements of the offense of missing movement, his Stipulation of Fact was not a confessional statement, and no duty to make a *Bertelson* inquiry was ever triggered.

7. **Because the Prosecution Presented Evidence on the Missing Movement Charge, This Indicates That the Stipulation Was Not a Confessional Statement.**

As noted above, one signal that should alert the military judge that a stipulation is a confessional statement is when both the prosecution and defense rest without presenting any evidence beyond the stipulation. *Kepple, supra*, 27 M.J. at 780. In the instant case, the prosecution did ***not*** rest without presenting any evidence, but instead called a witness to testify regarding the factual circumstances surrounding 1LT Watada's failure to board the plane headed with his unit which was deploying to Iraq. Thus, this also demonstrates that the Stipulation in this case was not a confessional statement, and that there was no need for any *Bertelson* inquiry.

8. **Because Petitioner Intended to Present Evidence on the Missing Movement Charge, and to Contest His Guilt, the Stipulation was Not a Confessional Statement. There was No Need to Conduct A *Bertelson* Inquiry, and No Need to Declare a Mistrial.**

The fact that defense counsel stated that the accused was going to testify, and was going to explain why he felt he had an obligation ***not*** to comply with the order to move, also demonstrates that the stipulation was not a confessional statement.

Contrariwise, in *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999), the accused entered into a pretrial agreement not to call witnesses or present evidence on his behalf, which had the effect, as the Court noted, of transforming the trial into an "empty ritual." Nonetheless, the Court denied the accused the relief he sought because the judge engaged in an adequate colloquy with the accused, and the accused was not deprived of due process. *Id.* at 430-31.

Because the Stipulation of Fact in the instant case was ***not*** a confessional statement, there was no need to conduct any *Bertelson* inquiry at all, and thus no need to declare a mistrial based on the erroneous perception that the accused was in some way contradicting a confessional statement of fact by proposing a jury instruction. Not only was there no "high degree" of necessity for declaration of mistrial, *Arizona v. Washington*, *supra*, 434 U.S. at 506, there was absolutely ***no*** necessity at all.

9. **The Government's Attempts to Change its Position as to Whether the Stipulation was a Stipulation of Fact or a Confessional Stipulation.**

The Government now appears to be insisting that the Stipulation was confessional, even though it did not admit all the elements of the charge of missing movement, and even though it did not contain any admission of guilt.

Moreover, the Government now takes a position that is completely inconsistent with the position taken by Trial Counsel.

At trial, prior to the empanelling of the members, the military judge engaged in a colloquy with the accused and with counsel. Trial counsel indicated the Government was satisfied with the state of the record regarding the Stipulation and the Pretrial Agreement, and indicated that no further inquiry was needed. *Trial Transcript* at 140.

On the third day of trial, however, after the defense had submitted a proposed instruction related to mistake of fact, the judge engaged in a lengthy examination of the accused, as well as colloquy with counsel.

While this is set out in great detail in the Renewed Petition at pp. 13-28 and at 35-40, it is clear that the Government did not see the problem the judge saw, and took the position, until being essentially browbeaten into changing its position, that the Stipulation was a Stipulation of Fact, and that it did not impose an impediment to the trial proceeding.

The military judge asked trial counsel if he understood the Court's problem and Trial Counsel candidly said he did not:

> MJ: Do you understand my problem, government, with this?
>
> TC: Frankly, Your Honor, no.

Id. at 368.

After a brief recess, the military judge asked defense counsel and Government counsel one more time if they could not see that the Stipulation of Fact was a confessional stipulation, but both again did not agree with the court:

> MJ: Mr. Seitz, defense counsel, one more time: Do you believe that Prosecution Exhibit 4 is a confessional stipulation, as to Charge 1?
>
> CC: ***No, I do not. I believe it's a stipulation of fact.***
>
> MJ: Government, I understand you needed some more time. Have you had enough time? Did you have the time that you needed?
>
> TC: We did, Your Honor. Thank you. ***The government concurs, and believes this also to be a stipulation of fact.***
>
> MJ: Does it not cover every element of the offense? Is this not a confessional stipulation of fact? How can I accept a confessional stipulation of fact under *Bertelson* where the defense doesn't concur that it's a confessional stipulation of fact?

> TC: The government's understanding is that it is a stipulation of fact; the accused has not pleaded guilty to the offense and ***if he [has] evidence to present that would be able to prove that he is not guilty of the offense, then the court should hear that evidence.***

Id. at 370-71 (emphasis added).

When counsel for the Government reiterated that he agreed with defense counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation – the parties agree that it is a stipulation of fact.***

Id. at 371 (emphasis added).

At oral argument on Petitioner's Motion to Dismiss in the trial court on 6 July, 2007, as well in the Government's Opposition, filed on 29 May, 2007, to the initial "Petition for Extraordinary Relief," the Government's position has dramatically changed. The Government now repudiates its emphatic position at the time of trial that the Stipulation was confessional and not factual, and has thrown its lot in with the military judge.

A review of the trial transcript, however, discloses no indication from the Government that in its view, the Stipulation was confessional. To the extent the Government ***now*** takes that position, it appears calculated to support the notion that Petitioner breached the Pretrial Agreement, and that it became manifestly necessary to declare a mistrial. This switch of positions constitutes intentional and tactical self-contradiction.

The rules of "equitable estoppel" and "judicial estoppel" are intended to prohibit just such conduct. Those rules "generally prevent a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *See, e.g., Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L. Ed.2d 164 (2000). In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the United States Supreme Court held that the doctrine of "judicial estoppel" could be utilized in the federal courts. *Id.* at 756.

The purpose of the rule is to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), cited with approval in *New Hampshire v. Maine, supra*, 532 U.S. at 749, and prevents a party from assuming inconsistent positions in litigation. *See, e.g., In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004) (citing *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988).

In her separate opinion dissenting in part and concurring in part in *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005), Judge Crawford concurred in the result because, as she stated, "this case can and should be decided on the basis of judicial estoppel," which she explained as follows:

> Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later. *See Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (approving courts' use of the doctrine to preclude such changes in position); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (identifying one of the policies underlying judicial estoppel doctrine as "preventing internal inconsistency"). It is an effective tool for discouraging or preventing the prosecutorial inconsistency that occurred in this case. ***Judicial estoppel would bar the prosecution in this case from advocating at this Court a position inconsistent with that of the trial prosecutor***, who had a chance to hear all the evidence and observe the demeanor of the members and the witnesses.

Id. at 193 (emphasis added)(Crawford, J., writing separately in a decision in which the majority reversed the accused's convictions on grounds that did not address the concept of "judicial estoppel").

In light of the Government's dramatic change of position with regard the character of the Stipulation (with no new facts that might alter the analysis), this Court ought to approach the Government's current position with extreme skepticism and ask itself why, other than that the Government's ability to meet its burden of establishing that the judge was justified in declaring the mistrial is nearly insurmountable, the Government would so clearly repudiate its earlier interpretation of the meaning of the Stipulation the parties had entered into.

F. **EVEN ASSUMING, *ARGUENDO*, THAT THE STIPULATION WAS A CONFESSIONAL STATEMENT AND THAT A *BERTELSON* INQUIRY WAS THEREFORE REQUIRED, THE JUDGE CONDUCTED A MORE THAN ADEQUATE *BERTELSON* INQUIRY, AND THERE WAS NO NEED TO REJECT THE STIPULATION.**

Even assuming, *arguendo*, that the Stipulation *was* a confessional statement, there still was no basis for declaring a mistrial. To begin with, *Bertelson* does ***not*** forbid the acceptance of confessional stipulations: "We reject the contention that such a confessional stipulation cannot be admitted under any circumstances." *Bertelson, supra*, 3 M.J. at 315. Instead, the case merely holds that before accepting a confessional stipulation, the judge must conduct an inquiry adequate to ensure that the accused knows what he is doing and wants to do it.

> [A] military judge…may admit a stipulation which amounts practically to a confession provided that the accused has first knowingly, intelligently and voluntarily consented to its admission. *United States v. Rempe*, 49 C.M.R. 367 (A.F.C.M.R. 1974). If an accused and his lawyer, in their best judgment, think there is a benefit or advantage to be gained by entering otherwise objectionable evidence, as in *Rempe*, where the accused consented to the admission of a confessional stipulation in order to preserve an error for appellate review, we perceive no reason why they should not be their own judges with leeway to do so.

Bertelson, supra, 3 M.J. at 315-16.

> Before accepting such a stipulation, however, the judge must do four things. First, the judge is required to expressly communicate [to the accused] before accepting his confessional stipulation that under the Manual it could not be accepted without his consent.

Id. at 316. This was faithfully done in this case. *Transcript*, at 126-129 (*see* accompanying "Renewed Petition" at pp. 6-9).

> Further, the military judge [is] required to apprise the accused, as he did here, that the Government has the burden of proving beyond a reasonable doubt every element of the offense and that by stipulating to material elements of the offense, the accused alleviates that burden.

Id. at 316. This was also faithfully done in this case. *Transcript*, at 126-129 (*see* accompanying "Renewed Petition" at 6-9).

Third, in those cases wherein a Stipulation constitutes an acknowledgement of guilt:

> …the trial judge, in addition to making the inquiry set forth in Part I of this opinion, must also ascertain from the accused on the record that a factual basis exists for the stipulation.

Bertelson, at 317. In the instant case, Petitioner did ***not*** acknowledge his guilt, thus making this third inquiry unnecessary. Nevertheless, the military judge conducted this inquiry and did elicit the factual basis for the stipulation on the record. *Transcript*, at 129-33.

Finally, *Bertelson* holds that:

> The judge shall also conduct a plea bargain inquiry in accordance with the guidelines set forth in *United States v. Green*, [1 M.J. 453 (C.M.A. 1976)]. Should this plea bargain inquiry reveal the existence of an agreement not to raise defenses or motions, the confessional stipulation will be rejected as inconsistent with Article 45(a).

Id. at 317. In this case, such an inquiry was conducted. It was clearly stated on the record that Petitioner understood the

Pretrial Agreement, wished to enter into it, and that he had no doubts about it. *Transcript*, at 140-148.

It must be noted here, as well, that the Pretrial Agreement can be read to explicitly permit the defense to raise defenses or motions. At a minimum, there is nothing in the Agreement that prohibited raising defenses, which casts further doubt on the military judge's interpretation.

In sum, even if *Bertelson* was applicable to this case, which it is not, there was no obstacle to continuing to accept the stipulation, since all *Bertelson* inquiry requirements were met.

G. EVEN IF THE STIPULATION OF FACT WAS A CONFESSIONAL STATEMENT, A DEFENDANT NEED NOT *AGREE* WITH THE JUDGE'S INTERPRETATION OF THE LEGAL EFFECT OF THE STIPULATION; HE NEED ONLY *UNDERSTAND* IT, AND NEVERTHELESS WANT TO ENTER INTO IT. PETITIONER FULLY UNDERSTOOD BUT RESPECTFULLY DISAGREED WITH THE JUDGE'S LEGAL CONCLUSIONS AS TO THE EFFECT OF HIS STIPULATION.

Both the *Bertelson* and *Kepple* decisions expressly recognize that a military judge should respect the judgment of the accused and his counsel. So long as they have been informed and understand the consequences of the stipulation, the judge should not interfere with their judgment that entering into the stipulation is in the accused's best interests. The *Kepple* decision "credits the conventional wisdom of the accused and counsel." *Kepple*, *supra*, 27 M.J. at 779. On that point, the *Bertelson* court stated:

> If an accused and his lawyer, in their best judgment, think that there is a benefit or advantage to be gained by entering otherwise objectionable evidence…we perceive no reason why they should not be their own

judges with leeway to do so.

Bertelson, supra, 3 M.J. at 315-16.

What seems to have occurred here, however, is that the military judge mistakenly conflated the type of inquiry required by *Bertelson* or *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969), with a providence hearing on a guilty plea. There was no requirement that Petitioner accept and articulate his guilt. He was perfectly within his rights to enter into a Stipulation that might very well have resulted in his conviction, but which preserved his ability to present certain arguments on appeal. The military judge's mistake was in holding Petitioner to a standard expected of an accused pleading guilty.

H. **THE MILITARY JUDGE MISREPRESENTED THE RECORD. THERE WAS NO INCONSISTENCY OF *FACT* BETWEEN WHAT PETITIONER SAID AT THE START OF THE TRIAL OR IN HIS STIPULATION OF FACT ABOUT WHAT HAPPENED, AND THE SUBSEQUENT DEFENSE SUBMISSION OF A PROPOSED JURY INSTRUCTION IN A POINT OF *LAW*.**

It is clearly settled that "when…a stipulation of fact clearly demonstrates guilt, but ***the accused's testimony*** is inconsistent therewith, the military judge has a duty to note the inconsistency and seek explicit clarification." *United States v. Epps*, 25 M.J. 319, 321 (C.M.A. 1987) (emphasis added). In *Epps*, after stipulating that he wrongfully took money from the wallet of another soldier, Epps testified that it was another who took the money out of the wallet and that he (Epps) was "just standing there watching." *Id.* at 320. This ***was*** a statement of fact that was inconsistent with the factual stipulation that he stole the money, and thus it ***did*** trigger a judicial duty to inquire and to clarify the inconsistency.

In contrast, in the instant case, the military judge mistakenly believed that this duty to seek clarification was triggered by a supposed inconsistency between the Stipulation of Fact *and a proposed jury instruction* submitted by the defense. A proposed jury instruction is not testimony. A proposed jury instruction is simply one party's assertion of what the governing law is. Because an assertion as to what the law is can never be inconsistent with an assertion of fact, ***no*** inconsistency triggering ***any*** duty to inquire can ***ever*** be triggered.

Moreover, in the instant case, as defense counsel pointed out to the military judge, the defense fully expected that the judge would decline to give the proposed instruction. *Transcript*, at 356-57.

There had already been a pretrial hearing, at which the judge had made it clear that his analysis of *the law* was quite different from that of the defense. Disagreements as to principles of law do not raise any concern as to inconsistent assertions of fact, and therefore, the military judge's expressed concern about an inconsistency in this case was entirely unfounded and without merit.

I. EVEN IF THERE WAS SOME NEED TO REJECT THE STIPULATION, AND TO BRING BACK TWO OF THE DISMISSED CHARGES, THERE WAS STILL NO NEED TO DECLARE A MISTRIAL. A CONTINUANCE WOULD HAVE SOLVED THE PROBLEM. THE GOVERNMENT ACKNOWLEDGED IT COULD HAVE ALL OF ITS WITNESSES AVAILABLE BY MARCH 19, 2007. SUCH A CONTINUANCE WOULD HAVE ADDRESSED THE MILITARY JUDGE'S CONCERN AND ALSO PRESERVED THE PETITIONER'S VALUED RIGHT TO GO TO THIS PARTICULAR JURY FOR A FINAL DETERMINATION OF HIS GUILT OR INNOCENCE.

As noted above, the declaration of a mistrial "is a drastic remedy and should be granted only where the circumstances demonstrate 'a manifest necessity to terminate the trial to preserve the ends of public justice.'" *United States v. Dennis*, 16 M.J. 957, 965 (A.F.C.M.R. 1983); *United States v. Jeanbaptiste*, 5 M.J. 374, 376 (C.M.A. 1978).

For example, where the receipt of improper evidence can be "neutralized by other means," a declaration of mistrial is not required. *Id.* "Even when there are circumstances which raise serious doubt regarding the fairness of the proceedings, the trial judge must, before granting a mistrial, determine that an alternative measure, less drastic than mistrial, would not alleviate the problem so as to allow the trial to continue to an impartial verdict." *United States v. Ghent*, *supra*, 21 M.J. at 550.

Where there *are* other alternatives to declaration of a mistrial, the declaration of mistrial is a judicial abuse of discretion and double jeopardy bars a retrial. For example, in *United States v. Rex*, 3 M.J. 604 (C.M.R. 1977), the Court declared a mistrial because of a *perception* that one of the five members of the jury panel could not follow the Court's instructions to disregard certain statements made by defense counsel. The appellate court noted that even assuming, for the sake of argument, that the fifth member of the panel was now unfit to serve, the "draconian remedy" of a mistrial was unnecessary because an alternative existed:

> [I]t is patently obvious that it was not necessary to eliminate all the members in order to eliminate the one about whom the judge had some 'misgiving.' [Footnote omitted]. Even with that member excused, four other members remained who were untainted and who would comprise more than a jurisdictional quorum. Thus, the correct decision of the trial judge was not to declare a mistrial, but to continue with the four members about whom the record clearly evinces that there was no necessity to remove the case by declaring a mistrial.

Id. at 610. Accordingly, the judge's decision to declare a mistrial, rather than continue the trial with four panel members, was an abuse of discretion, and the retrial was barred. *Id.*

Similarly, in the instant case, even assuming for the sake of argument that the military judge was correct in his determination that he had to reject the Stipulation of Fact and set aside the Pretrial Agreement, he gave absolutely no thought at that time (unlike the justifications ***now*** offered by the military judge in his Ruling of 11 July, 2007) to any other alternative way of dealing with the situation other than declaration of a mistrial.

The judge recognized that once the stipulation was set aside, the Government would have no evidence on several of the charges because it would be caught without many of the witnesses it needed to establish the offenses. Nonetheless, the judge did not even pause to consider the possibility of recessing the trial, and resuming it at a later date when the Government ***would*** have its witnesses available to testify.

After eliciting the defense position that it was opposed to a mistrial, the judge simply announced that the court's calendar was open on the week of March 19, 2007:

> MJ: Defense, do you want to be heard?
>
> CC: Yes. We would oppose the motion.
>
> MJ: Counsel, I have the week of 19 March available.

Transcript, at 374. There was absolutely no consideration of any other alternative besides declaration of a mistrial. The possibility of a trial continuance was never discussed, nor a discussion about a possible curative instruction.

This failure to recognize the viable alternative of a continuance is particularly egregious since the judge actually asked the Government if its witnesses would be available the week of March 19, 2007, and received an affirmative answer:

> MJ: At this point I won't set it for May 7th, I will set the initial date. And then I'll adjust, as every court does, for good cause shown. If you have a

> legitimate conflicts [sic]. That's just how the system works. ***Government, would you have your witnesses available the week of 19 March?***
>
> TC: ***Yes, Your Honor. I believe the Government can arrange witnesses for March 19th.***

Transcript, at 375 (emphasis added).

Thus, there was no consideration of the possibility of recessing and continuing the trial to the week of March 19, 2007. Indeed, the only reason the judge focused on the week of March 19th was that that week was open on the court's calendar.

It was entirely possible, of course, that the Government might have been able to get their witnesses into court much faster than that. Perhaps only a one or two week continuance would have been required. The answer to that question will never be known, because in his rush to simply declare a mistrial without considering any other alternative, the military judge never inquired at all about the possibility of a continuance, and never asked the Government when the earliest possible availability of its witnesses might be.

As the court noted in *Ghent*:

> If a trial judge acts irrationally, irresponsibly, precipitately or otherwise abuses his discretion, his decision to grant a mistrial cannot be condoned. [Citation omitted.] This is also true where he has not engaged in sufficient inquiry to decide the issue. [Citation omitted.] Without complete information, a judge cannot "assess all the factors which must be considered in making a necessarily discretionary determination regarding the jury's ability to render an impartial verdict." [Citations omitted.]

Ghent, *supra*, 21 M.J. at 551.

The consideration of alternatives must be evident ***from the record***. "The record must support…a determination that there were 'no measures short of mistrial' that 'might have sufficed to mitigate or cure any perceived undue trial prejudice." *Id.*

In the instant case, as in *Ghent*, "the record fails to support a conclusion that less drastic measures would not have" cured the problem. *Id.* The judge ***never*** considered the viable alternative of a continuance of the trial that would have permitted Petitioner to have this particular panel decide his guilt or innocence. Thus, there was an abuse of judicial discretion, a total lack of manifest necessity for declaration of a mistrial, and there is a double jeopardy bar to a second trial.

It was only in the Ruling of 11 July, 2007 that the military judge embarked on an analysis of why there were no workable alternatives. Without conceding that he correctly analyzed the issues, Petitioner reiterates that ***none*** of this analysis occurred contemporaneously, and none appears in the record at trial.

J. THIS CASE IS SIMILAR TO *JORN*, WHEREIN THE COURT FOUND THAT THE TRIAL JUDGE ACTED PRECIPITOUSLY, WITHOUT CONSIDERING THE ASSURANCES OF COUNSEL THAT THERE WAS NO NEED FOR A MISTRIAL, AND WITHOUT CONSIDERING THE POSSIBILITY OF A CONTINUANCE.

While no two cases are factually identical, some of the parallels between this case and *United States v. Jorn*, *supra*, are quite striking. In the instant case, the military judge appears to have believed that Petitioner was confused, or that he somehow did not appreciate or understand the effect of his Stipulation, even though counsel for both sides assured him there was ***no*** problem with the Stipulation. In fact, Petitioner's counsel told the military judge, "*there is nothing in the stipulation that is contradicted by the instruction that we're offering to you.*" *Transcript*, at 356.

When the judge pressed Trial Counsel to disagree, Trial Counsel replied simply, "*Government tends to agree that there is no contradiction in the stipulation.*" *Id.* The military judge continued to hammer away at counsel for the Government, and asked again if he did not see the inconsistent positions that the accused was taking. Trial Counsel, however, continued to assert that he did not see any problem, stating simply, "Your Honor, I don't see it." *Id.* at 366-67.

In fact, the Government repeatedly ***agreed*** with civilian defense counsel, and repeatedly told the judge that he did not see any reason why the Stipulation of Fact was improper.

In a similar manner, in *Jorn*, the trial judge believed that five witnesses called by the prosecution did not understand that by testifying and waiving their right to remain silent, they might be incriminating themselves, even though the prosecutor assured him that they had been properly advised. Ignoring the prosecutor's assurances, the *Jorn* trial judge declared a mistrial. The Supreme Court condemned this precipitous course of action:

> [W]e must conclude that the trial judge here abused his discretion in discharging the jury. Despite assurances by both the first witness and the prosecuting attorney that the five taxpayers involved in the litigation had all been warned of their constitutional rights, the judge refused to permit them to testify, first expressing his disbelief that they were warned at all, and then expressing his views that any warnings that might have been given would be inadequate.

Jorn, supra, 400 U.S. at 486-87.

Moreover, in both cases, the trial judge acted without ever considering the possible alternative of granting a continuance. In *Jorn,* the Court noted: "It is apparent from the record that no consideration was given to the possibility of a trial continuance. Indeed, the trial judge acted so abruptly that, had the prosecutor been disposed to suggest a continuance…there would have been no opportunity to do so." *Id.* at 487.

The same is likewise true in the instant case, where the judge simply declared a mistrial, without asking either party if they preferred for him to grant a continuance to give the Government a chance to assemble the witnesses needed to attest to the facts that had been covered in the Stipulation of Fact which the judge was now suddenly rejecting. In fact, the court never solicited ***any*** suggestions as to ***any*** other alternative to his declaring a mistrial.

"[I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Id.* at 486. Because the trial judge did not do so, the *Jorn* Court found a violation of the double jeopardy clause. The same conclusion is compelled in this case.

K. IT IS THE COPURT'S RESPONSIBILITY TO EXPLORE ALTERNATIVES TO A MISTRIAL, AND THE GOVERNMENT'S BURDEN TO SHOW THERE WERE NONE.

It is not the accused's responsibility to show that there were alternatives to declaration of a mistrial. It is the Government's burden to prove that the trial judge actually considered alternatives to declaration of a mistrial, and that there were none. The record fails to show any meaningful consideration of alternatives by the judge.

Even assuming, for the sake of argument, that there was some valid reason that required rejection of the Stipulation of Fact and the Pretrial Agreement based upon it, there still was no manifest necessity that justified aborting the trial altogether. There were alternative measures that could have been taken, such as, for example, a mid-trial recess and resumption of trial some number of days later, which would have permitted the Government to produce any witnesses it might have needed to fill in the gaps caused by a withdrawal of the Stipulation, and for the trial to proceed with the same panel members.[6]

The Government has effectively conceded that the military judge failed to consider any alternative measures that might have allowed the trial to continue. Nevertheless, noting that neither party suggested any alternatives, the Government maintains that the judge's admitted failure to give meaningful consideration to any alternatives does not raise any double jeopardy bar to a retrial. This position is not only inaccurate, it simply flies in the face of overwhelming case precedent.

It should be completely non-controversial that is not incumbent upon the accused to justify the continuation of his trial; it is the Government's burden to justify its termination by mistrial over the accused's objection. To be justified, there must be no other viable alternative. "The Government bears the burden of demonstrating that, 'under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial.'" *United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004).

Thus, it is ***the Government*** that bears the burden of making sure that alternative measures are carefully considered on the record. Where they are not, the Government fails to carry its

[6] If a military judge rejects a stipulation, the parties may be entitled to a continuance, per R.C.M. 811 (b) and the Discussion that follows.

burden under *Arizona v. Washington*, and a retrial is barred.

Virtually all the United States Circuit Courts have recognized that where the record fails to show such careful consideration of alternative measures, retrial is barred. *See, e.g.*:

> *Walck v. Edmondson*, 472 F.3d 1227, 1240 (10th Cir. 2007) ("prior to discharging the jury, the state trial judge did not sufficiently consider the viable and reasonable alternatives to a mistrial;" retrial barred by double jeopardy);
>
> *Johnson v. Karnes*, 198 F.3d 589, 596 (6th Cir. 2000)("We further find it significant that the trial court judge failed to consider less drastic alternatives, but immediately decided that a mistrial was appropriate");
>
> *United States v. Rivera, supra*, 384 F.3d at 56 ("Where a District Court declares a mistrial in haste, without carefully considering alternatives available to it, it cannot be said to be acting under a manifest necessity. [Citations omitted]. Any subsequent reprosecution under those circumstances is barred by the Double Jeopardy Clause");
>
> *United States v. Toribio-Lugo*, 376 F.3d 33, 39 (1st Cir. 2004)("The district court only tentatively explored and never exhausted" a possible alternative… Where there is a viable alternative to a mistrial and the district court fails to explore it, a finding of manifest necessity cannot stand");
>
> *Love v. Morton*, 112 F.3d 131 (3rd Cir. 1997)("To demonstrate manifest necessity the state must show that under the circumstances the trial judge 'had no alternative to the declaration of a mistrial.' [Citation omitted]. The trial judge must consider and exhaust all other possibilities").[7]

[7] In *Morton*, the trial judge aborted the trial when he was informed that there had been a death in his family. He concluded that he needed to attend to family matters immediately so he declared a mistrial. He did not consider the option of excusing the jury overnight and continuing the trial the next day with a different judge.

Ordinarily, an appellate court's inquiry into whether a declaration of mistrial over the accused's objection was truly necessary focuses on "a triumvirate" of interrelated factors:

> (i) whether alternatives to a mistrial were explored and to exhausted; (ii) whether counsel had an opportunity to be heard; and (iii) whether the judge's decision was made after sufficient reflection.

Toribio-Lugo, 376 F.3d at 39.

In the instant case, the record shows that all three of these factors weigh heavily in favor of the conclusion that a retrial is barred.

It is not quite correct to assert that **no** alternatives were explored by the military judge. As it happens, the judge suggested the possibility that the Government could re-open its case, as the defense case had not yet started.

When counsel for the Government reiterated that he agreed with defense counsel, the Court simply announced that it was rejecting the Stipulation of Fact, and asked the Government if it wanted to move for a mistrial:

> TC: Your Honor, I don't know what else to say other than what's already been said. ***The parties agree about the contents of the stipulation - the parties agree that it is a stipulation of fact.***
>
> MJ: That's not the issue. ***At this point I'm reconsidering Prosecution Exhibit 4 and rejecting the stipulation of fact.*** It's now Prosecution Exhibit 4 for identification, as the government has closed its case. ***Government, do you wish to reopen your case, or*** do you wish, as we now have a material breach of the

> pretrial agreement, ***do you wish to request a mistrial because at this point we don't have evidence on every element?***
>
> TC: Your Honor, again, apologies to the court. This is not a decision I'm prepared to make at this time. I need another recess to discuss it with the Staff Judge Advocate.
>
> MJ: Certainly. I understand that it is a rather significant decision, ***as I will allow you to reopen your case as there's been no defense evidence presented at this point.*** And do [sic] to the posture of this case, and due to the way this issue has come up ---
>
> TC: Your Honor, if we were to - just for clarification sake, if we were to reopen the case and proceed forward, what would the instruction to the panel be in regards to Prosecution Exhibit 4?
>
> MJ: They would disregard it in the entirety. That's the problem we have is this is that how are we going to unring the bell?
>
> TC: Request a recess at this time, Your Honor.

Id. at 371-72 (emphasis added).

The significance of this exchange suggests that in the judge's mind, at least fleetingly, he saw an alternative to a mistrial, but did not analyze it carefully, and ***did not require the Government to analyze it on the record and indicate why it would not have solved the problem.***

In *Arizona v. Washington*, *supra*, the Supreme Court noted that there is, in appropriate circumstances, a balancing of society's interests and the right of the accused with regard to the double jeopardy analysis when it observed:

> Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor ***one full and fair opportunity*** to present his evidence to an impartial jury.

Id. at 505 (emphasis added).

In the instant case, the Government had its "full and fair opportunity to present its evidence." The prosecution presented its ***entire*** case with no obstacles or restrictions. Not only did the Government rest its case, it was offered the opportunity to re-open its case and it ***declined*** the invitation to do so. Thus, the Government participated in the error committed by the military judge, and must now accept the consequences of its failure to grasp the violation of the Constitution being contemplated.

The Government ***endorsed*** the military judge's error, and any opportunity it had to argue that it should have the chance to re-prosecute Petitioner was ***extinguished*** when it joined in the court's action and declined to proceed with the first trial.

The judge was the one who proposed a mistrial, and he goaded the prosecution into moving for it. In this respect, his action was similar to that of the trial judge in *Johnson v. Karnes, supra*, wherein the appellate court noted:

> [T]he state trial judge in Johnson's case pressured the prosecutor to make the decision at that very moment and only allowed a very brief recess before listening to

> counsel's arguments regarding the mistrial. Further, the trial court's failure seriously to consider alternatives to declaring a mistrial further militates against a finding that manifest necessity warranted a mistrial.

Johnson, 198 F.3d at 595.

Similarly, the trial judge in Petitioner's trial never asked either counsel for suggestions as to any alternatives, such as a continuance, and instead of "sufficient reflection" upon possible alternatives, the record shows absolutely no reflection at all. It is hard to imagine a record that shows a hastier and less reflective decision to declare a mistrial. This occurred despite the fact, as noted earlier, that trial defense counsel attempted to warn the judge of what was at stake when he noted:

> CC: Colonel, let me just say, I would assume that if that were to happen, you would allow us sufficient time to appeal from that order ***because jeopardy has attached, and it may very well be that the retrial is impermissible***. If that's the case, then we would need do discuss this and make some decisions. But, I would assume that that also would follow.

Trial transcript at 359. Even with that warning, the judge still failed to reflect upon what was at stake.

As in *Rivera*, "the record in this case demonstrates that the [trial court judge] failed to consider both the constitutional implications attendant to the declaration of a mistrial, as well as the reasonable alternatives to a mistrial." Here, as in *Rivera*, a retrial is barred.

The Government argues that a continuance was not a viable alternative because "the bell could not be unrung." By this the Government means that the panel members could not forget that they had been advised by stipulation that the accused received an order to deploy with his unit, and that he deliberately failed to move with his unit as ordered.

Not only does this overlook the fact that it may have been a part of Petitioner's defense strategy not to object to (and, indeed, to encourage) the panel's having been so advised, if a continuance had been ordered, rather than a mistrial, the Government could have produced the live witnesses who would have testified to the exact same facts that the panel members had been informed of by means of the Stipulation.

Thus, there would have been no need to "unring the bell," since the same evidentiary facts would then have been placed before the panel for its proper consideration. The military judge simply failed to consider this alternative.

With respect to the two specifications of Conduct Unbecoming an Officer that had been dismissed (without prejudice at that stage) pursuant to the Pretrial Agreement in exchange for the Stipulation of Fact, the military judge also never considered whether a mid-trial continuance would have allowed the Government to produce the witnesses it needed to present its case on those two charges. Since this alternative was never explored, there was no manifest necessity which justified declaration of a mistrial on these two specifications.

L. THE MILITARY JUDGE NEVER EVEN CONSIDERED THE POSSIBILITY THAT THE PARTIES MIGHT AGREE TO MODIFY THEIR STIPULATION OF FACT, SO THAT IT COVERED ONLY THE CONDUCT UNBECOMING AN OFFICER CHARGES. THUS, THE JUDGE NEVER CONSIDERED THE POSSIBILITY OF DECLARING ONLY A PARTIAL MISTRIAL.

Although Rule 915(a) specifically directs a military judge to consider the possibility of declaring only a *partial* mistrial, in this case the military judge never did this. The judge simply assumed that ***no*** part of the Stipulation could be salvaged.

The Stipulation of Fact was entered into in exchange for the Pretrial Agreement, which called for dismissal of two of the four Conduct Unbecoming an Officer specifications. The military judge simply assumed that if the Stipulation of Fact pertaining to the missing movement charge was rejected, that the parties would not want to adhere to any other part of their agreement.

It was entirely possible that notwithstanding invalidation of that part of the Stipulation dealing with the missing movement charge, the Government might still have been willing to dismiss 2 of the 4 Conduct Unbecoming an Officer specifications in exchange for Petitioner's stipulation to the authenticity and accuracy of the transcripts of his statements that were the basis for those charges.

Even if the Government had not been willing to dismiss 2 of the 4 Conduct Unbecoming specifications, the trial judge never ascertained whether Petitioner might *nevertheless* have been willing to stipulate to the authenticity and accuracy of the transcript of his remarks that formed the basis for the 2 Conduct Unbecoming specifications, which had been tried to the panel up to that point.

In sum, there was never ***any*** consideration given as to whether it was truly necessary to declare a mistrial on two of the specifications of Conduct Unbecoming an Officer. It was not a foregone conclusion that the ***entire*** stipulation had to be undone. The military judge could have asked the parties if they would consider amending their stipulation so that it continued to cover these two specifications.

If Petitioner had been willing to continue to stipulate to the facts covering those two specifications, those charges could have been submitted to the panel for a decision. But the military judge never considered this option, and never asked the parties if any part of their Stipulation could be maintained, despite the judge's refusal to accept that part of the Stipulation dealing with the missing movement charge.

Since the record does not disclose ***any*** careful consideration of alternatives of this kind, which might have led to a *partial* declaration of mistrial, the Double Jeopardy Clause should likewise be held to bar retrial of those two specifications of Conduct Unbecoming an Officer, upon which the Government did present its case.

VI. CONCLUSION

For the reasons stated above, Petitioner urges this Court to grant his motion to dismiss all charges on the grounds that they are barred by double jeopardy, since the mistrial was declared without the required manifest necessity.

There can be no question that the military judge acted precipitously and abused his discretion.

DATED this 26th day of July, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By [signature]
James E. Lobsenz
Kenneth S. Kagan
Of Attorneys for Petitioner

16

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

First Lieutenant Ehren K. Watada,
United States Army,

Petitioner,

v.

Lieutenant Colonel John M. Head, Military Judge, Lieutenant General Charles H. Jacoby, Jr., I Corps, Fort Lewis, Washington (Convening Authority for General Court-Martial), the United States Army, and the United States,

Respondents.

Army Misc. Dkt. No. ________;

Army Misc. Dkt. No. 20070535;

APPLICATION FOR STAY OF TRIAL PROCEEDINGS

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

James E. Lobsenz
Kenneth S. Kagan
Attorneys for Petitioner

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

TABLE OF CONTENTS

Page

I. PREAMBLE 1

A. REQUEST FOR A STAY OF PROCEEDINGS 3

II. UNDER *ABNEY v. UNITED STATES*, THE PRETRIAL DENIAL OF A CLAIM OF FORMER JEOPARDY MUST BE REVIEWED IN THE APPROPRIATE APPELLATE COURT BEFORE ANY RETRIAL MAY OCCUR 5

III. CONCLUSION 18

I. PREAMBLE

COME NOW the undersigned defense counsel on behalf of the Petitioner, 1LT Ehren K. Watada, pursuant to Rules 2(b) and 20.2(a) of this Court's Internal Rules of Practice and Procedure, and move this Court for the following relief:

> **Issuance of an immediate Stay of All Proceedings, not only prohibiting the military trial court from proceeding with the assembly of a court-martial panel, now scheduled to commence on 9 October, 2007, but proceeding with any further hearings.**

As will be discussed below, this Court should grant a Stay of Proceedings by viewing this situation as analogous to the rationale discussed in *Abney v. United States*, *infra*, which suggests that under the circumstances, a similarly situated petitioner is entitled to appellate review as a matter of right before being subjected to a second prosecution.

Alternatively, this Court should grant a Stay of Proceedings pursuant to the discretionary authority it has to do so, such as was exercised in many other cases, such as, *inter alia*, *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986).

This Stay of Proceedings should remain in effect pending resolution by this Court of 1LT Watada's *Renewed Petition for Extraordinary Relief in the Nature of a Writ of Prohibition*, *and, Alternatively, Motion for Reconsideration and Application for Stay of Proceedings*, which seeks interlocutory review of the military judge's rulings of 6 July, 2007 (oral) and 11 July, 2007 (written), denying Petitioner's pretrial motion for dismissal of all charges on Double Jeopardy grounds.

Additionally, this Stay of Proceedings should remain in effect pending resolution by this Court of Petitioner's Motion for Reconsideration of this Court's *Order* of 6/29/07, which dismissed his first *Petition for Extraordinary Relief in the Nature of a Writ of Prohibition*.

Finally, should this Court ultimately rule against Petitioner and in favor of the Government, this Stay of Proceedings should remain in effect pending resolution of the matter by the Court of Appeals for the Armed Forces.

This Application for a Stay of Proceedings is contemplated by Rule 20.2(a) of this Court's Internal Rules of Practice and Procedure, and is supported by, *inter alia*, the reasoning of the United States Supreme Court's holding in *Abney v. United States*, 431 U.S. 651, 659-60 (1977), to the effect that an accused is entitled to immediate appellate review of a pretrial order denying a motion to dismiss on double jeopardy grounds, and that no trial proceedings may be had pending resolution of that appellate review.

A. REQUEST FOR A STAY OF PROCEEDINGS

Because jeopardy previously attached, and a mistrial was improvidently granted by virtue of an abuse of discretion, a second trial on the same charges is the very evil sought to be avoided. In light of the substantial likelihood that Petitioner will prevail on the merits of his motion for dismissal, it is appropriate for this Court to grant Petitioner's Application for a Stay of Trial Proceedings until this matter has been decided with finality by the appellate courts.

The accused previously filed a *Petition for Extraordinary Relief in the Nature of a Writ of Prohibition*, seeking dismissal of all charges pending against him on Double Jeopardy grounds. This Court initially granted a temporary partial stay prohibiting the retrial (which was at that time scheduled to commence on 23 July, 2007) pending resolution of the *Petition* by this Court. Then, on 29 June, 2007, this Court dissolved that partial stay and denied the Petition in an Order which, in its entirety, read as follows:

> Petitioner has filed a motion for extraordinary relief to enjoin his upcoming court-martial on former jeopardy grounds without first moving to dismiss under R.C.M. 907(b)(2)(C) and 915(c)(2). ***Under these circumstances***, we deny petitioner's motion for extraordinary relief. Our order of 18 May 2007 is vacated.

Order 6/29/07 (Army Misc. Dkt. No. 20070535)(emphasis added).

On 2 July, 2007, three days after this Court issued the above-quoted order, and in accordance with the Order's statement that it was premised upon the then-existing circumstances that the accused had not moved to dismiss on double jeopardy grounds in the trial court, Petitioner filed a motion with the Trial Judge in the Fourth Judicial Circuit, Fort Lewis, Washington, seeking dismissal of all pending charges against him on double jeopardy grounds.[1]

That motion was argued before the Respondent,[2] Lieutenant Colonel John M. Head, on 6 July, 2007, at Ft. Lewis, Washington. The military judge orally denied that motion on the day of the hearing, indicating that a written decision explaining the Court's ruling would be forthcoming in the following week.

Based upon the reasoning and rationale contained in the *Abney* decision, counsel for the accused argued that no new trial date should be set, or that if one was set it should be automatically stayed. The military judge refused to delay the setting of a new trial date, and refused to stay the new trial date. The military judge directed counsel to supply him with dates when they were unavailable, and indicated he would set the new trial date at some time during the following week.

---

1 A complete copy of that Motion to Dismiss is annexed hereto as Appendix A. That Motion presented the same arguments that were previously presented to this Court in the accused's first "Petition for Extraordinary Relief in the Nature of a Writ of Prohibition."

2 It should be noted that references to the names of some of the Respondents have changed since the initial filing in the United States Army Court of

Counsel for the accused asked the military judge if it would be helpful for the accused to file a brief addressing the *Abney* case in support of his motion for a stay of the court-martial proceedings. The military judge replied that he did not desire any briefing on the subject; that he did not consider the *Abney* case binding upon the military courts; and that accordingly he would not grant a stay. He directed counsel for the accused to submit any motion for a stay of the subsequent court-martial proceedings to the Army Court of Criminal Appeals.

On 11 July, 2007, the military judge issued a written order explaining the basis for his denial of the accused's motion to dismiss all charges on double jeopardy grounds.[3]

The following day, in an e-mail message sent on 12 July, 2007, the military judge did advise all counsel that he was setting the new trial date for 9-12 October, 2007.[4]

II.

UNDER *ABNEY v. UNITED STATES*, THE PRETRIAL DENIAL OF A CLAIM OF FORMER JEOPARDY MUST BE REVIEWED IN THE APPROPRIATE APPELLATE COURTS BEFORE ANY RETRIAL MAY OCCUR.

Jeopardy attached on 5 February, 2007 when the panel members were sworn in at Petitioner's first trial. *Crist v. Betz*, 437 U.S. 28, 35 (1978). The military judge declared a mistrial on 7 February, 2007. The military judge immediately set

---

Criminal Appeals to reflect two subsequent changes in the command structure in I Corps and at Fort Lewis, Washington.

a new date for commencement of the retrial. That date was subsequently continued and the retrial is now scheduled to commence on 9 October, 2007.

As previously argued in the Brief submitted in support of the accused's first *Petition for Extraordinary Relief in the Nature of a Writ of Prohibition*, the granting of a mistrial over the objection of the accused was erroneous since there was no manifest necessity that warranted aborting that trial. Additionally, the military judge failed to consider any alternatives to the granting of a mistrial.

Petitioner hereby incorporates by reference his previously filed *Petition for Extraordinary Relief in the Nature of a Writ*, his *Brief in Support of the Petition for Extraordinary Relief in the Nature of a Writ*, and his *Brief in Reply to the Government's Opposition*, as well as the accompanying *Renewed Petition for Extraordinary Relief in the Nature of a Writ*, and the accompanying *Brief in Support of the Renewed Petition for Extraordinary Relief in the Nature of a Writ*.

Because a second trial on the same charges is the very evil the Double Jeopardy Clause protects against, it is appropriate for this Court to stay the second assembly of a court-martial panel now scheduled to commence on 9 October, 2007, until this

---

[3] A copy of this written ruling is annexed hereto as Appendix B.
[4] A copy of this e-mail is annexed hereto as Appendix C.

matter has been decided with finality by the appellate courts.

Initially, this Court apparently determined that there was sufficient force to Petitioner's Double Jeopardy arguments to warrant issuance of a temporary partial stay order. This Court issued that stay on 18 May, 2007. That Order stated:

> That Petitioner's request for an immediate stay of proceedings is granted in part. The government may proceed in its case against petitioner up to, but not including, assembly of the court-martial. Assembly of the court-martial and all proceedings ordinarily following assembly of the court-martial are hereby stayed.

Order, 5/18/07.

In its more recent Order of 29 June, 2007, this Court dissolved that partial stay on the ground that Petitioner had not presented his Double Jeopardy motion to dismiss to the trial court. On 2 July, 2007 Petitioner responded by filing a motion to dismiss with the military judge. On 6 July and 11 July, 2007, the military trial judge denied that pretrial motion orally and in writing, respectively. Thus, the reason for dissolving the partial stay, which this Court had previously issued, no longer exists.

This case is now in a posture in which a stay prohibiting retrial should be entered. Such a stay should remain in place ***at least*** until such time as this Court has addressed the merits of the double jeopardy issue.

If a stay is not issued and a second trial is permitted, the very evil prohibited by the Double Jeopardy Clause will be permitted to occur. It is for this very reason that the United States Supreme Court recognized that the denial of a motion to dismiss on double jeopardy grounds by a trial court ***is immediately appealable.***

Under the "collateral order" doctrine, the denial of such a motion is immediately appealable notwithstanding the lack of the usual type of "finality" required before a judgment or an order may be appealed:

> Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, ***we conclude that such orders fall within the "small class of cases" that Cohen [v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)] has placed beyond the confines of the final-judgment rule.*** [FN omitted]. In the first place there can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps to be taken in the [trial] [c]ourt to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence *Cohen's* requirement of a fully consummated decision is satisfied.
>
> Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principle issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. [Citation omitted]. Rather, he is contesting the very authority of the Government to hale him into court to

> face trial on the charge against him. [Citations omitted]. The elements of that claim are completely independent of his guilt or innocence. Indeed, we explicitly recognized that fact in *Harris v. Washington*, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971), where we held that a State Supreme Court's rejection of an accused's pretrial plea of former jeopardy constituted a "final" order for purposes of our appellate jurisdiction under 28 U.S.C. § 1257. [FN omitted].

Abney v. United States, *supra*, 431 U.S. at 659-660 (emphasis added).

The Supreme Court further recognized that unless the defendant could obtain immediate appellate review of the denial of a dismissal motion based on former jeopardy, the rights protected by the Double Jeopardy Clause would be rendered essentially meaningless. Without an avenue for immediate appellate relief, the defendant would be forced to endure the violation of his right not to be tried without being able to prevent the violation from occurring:

> ***Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.*** To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, ***this court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.*** [FN and citations omitted]. Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other

> things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. . .
>
> [Citations omitted]. ***Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken***; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double jeopardy Clause was designed to prohibit. [FN omitted]. ***Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.***

Abney, *supra*, 431 U.S. at 660-62 (emphasis added). *Accord*, *United States v. Olmeda*, 461 F.3d 271, 278 (2d Cir. 2006)(acknowledging jurisdiction over interlocutory appeal from denial of pretrial motion to dismiss on double jeopardy grounds, citing *Abney*); *United States v. Elliot*, 463 F.3d 858, 863 (9th Cir. 2006)(same); *Harpster v. Ohio*, 128 F.3d 322, 325(6th Cir. 1997)(same).

Abney holds that a Double Jeopardy Clause challenge to the power of the government to subject the accused to a second trial "must be reviewable before that subsequent exposure occurs," 431 U.S. at 662. Therefore, by analogy to the situation posed in *Abney*, Petitioner is constitutionally entitled to have this Court review the denial of his pretrial motion to dismiss on double jeopardy clause.

By analogy to the "collateral order" doctrine, it must not be necessary for him "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense," without *first* obtaining full appellate review of his double jeopardy claim that the second trial is constitutionally prohibited. *Abney*, 431 U.S. at 661. The right to immediate interlocutory appellate review of the trial court's denial of a double jeopardy motion to dismiss serves to protect the constitutional right not to be tried more than once.

It is unclear, of course, how long the appellate process will last in this case. In the event the appellate process has not concluded by 9 October, 2007, issuance of an appellate court stay of the scheduled retrial would become constitutionally necessary because the military judge presiding over the retrial has refused to acknowledge the accused's right to a stay of the retrial pending appellate review of his double jeopardy claim. Moreover, if a stay is not issued promptly, Petitioner and his counsel will be forced to go through what might be the completely unnecessary effort, strain, and expense of preparing for a trial that may never occur.

If review of Petitioner's *Renewed Petition for Extraordinary Relief* has not been finally resolved by 8 October, 2007, then the retrial would commence the next day, in the absence of a stay. Should this occur, as the Supreme Court noted in *Abney*, "the guarantee's protections would be lost" because "the accused [would be] forced to 'run the gauntlet' a second time before [his] appeal could be taken and resolved." 431 U.S. at 662.

At the 6 July, 2007 pretrial hearing, as noted above, the military trial judge stated that he does not believe the holding and rationale in *Abney* applies to the military courts. Therefore, he stated that he intended to proceed with the assembly of a court-martial panel on 9 October 2007, regardless of whether or not the appellate review process has been completed.

While it is certainly true that the *Abney* decision arose in a civilian, and not a military context, and thus did not construe Article 66 of the Uniform Code of Military Justice, the United States Supreme Court has never even suggested, much less held, that the Double Jeopardy Clause applies with any less force to military prosecutions than it does to civilian ones. On the contrary, it has held the exact opposite.

In *Wade v. Hunter*, 336 U.S. 684 (1949) the Supreme Court expressly *rejected* the contention that the "manifest necessity" test applicable to criminal cases in the civilian courts was somehow not applicable to cases of military courts-martial. The Supreme Court agreed that as of 1949 "[t]he interpretation and application of the Fifth Amendment's double jeopardy provision have been considered chiefly in civil rather than military court proceedings." *Wade*, 336 U.S. at 688.

The *Wade* Court further noted that "the guiding rule of federal courts" for determining whether the Government could proceed with a second trial for the same offense was "outlined by this Court in *United States v. Perez*, 9 Wheat 579, 6 L.Ed. 165 [(1824)]," and that "[t]he rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy." *Wade*, 336 U.S. at 689, 690.

In response to the Government's suggestion that the *Perez* "manifest necessity" rule should not be applicable to military courts-martial, the Supreme Court brusquely rejected this contention:

> Under the [*Perez*] rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. ***We see no reason why the same broad test should not be applied in deciding whether a court-martial action runs counter to the Fifth Amendment's provision against double jeopardy.***

Wade v. Hunter, 336 U.S. at 690 (emphasis added).

To the best of the knowledge of the Petitioner's attorneys, since the time *Wade* was decided, ***no*** military court has ever suggested that the application of the Fifth Amendment Double Jeopardy Clause to military courts-martial differs in any way from its application to criminal prosecutions brought in the civilian courts.

Several military courts have expressly acknowledged that the same Double Jeopardy principles applicable in civilian courts also apply in military courts. *See, e.g., United States v. Rex*. 3 M.J. 604, 609 (N.M.C.M.R. 1977) ("The concept of former jeopardy was held applicable to the military in *Wade v. Hunter* . . . The same manifest necessity rule used in federal jurisdictions is thus required in a court-martial.").

Military courts routinely apply U.S. Supreme Court precedents in the area of double jeopardy to courts-martial prosecutions. *See, e.g., Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986)[holding retrial barred by Double Jeopardy and applying the rule of *Arizona v. Washington*, 434 U.S. 497 (1978)]; *United States v. Ghent*, 21 M.J. 546 (A.F.C.M.R. 1985) (same).

Moreover, this Court has expressly recognized the applicability of *Abney* to courts-martial, distinguishing between the denial of motions to dismiss on speedy trial grounds, which are not "collateral orders," and the denial of pretrial double jeopardy dismissal motions, which *are* immediately appealable. *See*, e.g., *Pascascio v. Fischer*, 34 M.J. 996, 1001 (A.C.M.R. 1992) ("The collateral order doctrine has been applied to permit interlocutory review of a trial judge's denial of a motion to reduce bail [citation omitted], and denial of a motion to dismiss for double jeopardy," *citing Abney*).

Counsel for the accused are not aware of any reported case in which any federal trial judge ignored the rule of *Abney* and attempted to proceed with a second trial before an appeal of the trial judge's denial of a double jeopardy dismissal motion could be resolved.[5] There are a few cases, however, wherein a retrial was scheduled to proceed in a *State* court, and the *State* court trial judge refused to delay the retrial pending resolution of a double jeopardy challenge raised in a federal habeas corpus petition. In those cases, the federal judges presiding over the habeas corpus petition cases found it necessary to enjoin a state court from proceeding with a second trial pending the resolution of the habeas petition.

Even though those cases involved issues of federalism and comity between state and federal courts (which obviously are not present in this case), the federal courts did not hesitate to issue orders that prohibited the state courts from going ahead with the scheduled retrial until such time as the federal habeas corpus review was completed.

As examples of cases wherein federal courts acted with regard to pending state court prosecutions, *see*, *inter alia*, *Harpster*, *supra*, 128 F.3d at 325 ("Respondent argues that the District Court should not have stayed the state court

[5] It appears that in all such cases, the trial judge simply recognized that he or she was constitutionally obligated to delay the retrial until the appeal of his pretrial ruling had concluded, and thus there was no occasion to ask an appellate court to stay a retrial, because the retrial simply was not scheduled to occur until after the appeal had concluded.

proceedings against petitioner to allow the litigation of his double jeopardy claim before his second trial. Because petitioner is entitled to have his double jeopardy claim litigated before being retried, we reject respondent's arguments"); *Hartley v. Neely*, 701 F.2d 780, 781 (9th Cir. 1983)("a petitioner in state custody can only be assured freedom from double jeopardy by giving him access to habeas review prior to a second trial."); *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992), *cert.* denied, 506 U.S. 1048 (1993)("Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain *pretrial* habeas petitions that raise a colorable claim of double jeopardy"); *Wilson v. Czerniak*, 355 F.3d 1151, 1157 (9th Cir. 2004) ("double jeopardy claims presented an exception to the general rule requiring federal courts to abstain from interference with state court proceedings"); *Gilliam v. Foster*, 61 F.3d 1070, 1074 (4th Cir. 1995), ("given that Petitioners have asserted a strong double jeopardy claim, the only means by which their right not to be put to the burden, anxiety, and expense of enduring a second trial may be protected is to stay the state criminal proceedings until the district court may rule on the merits of Petitioners' habeas petition");[6] *Schillaci v. Peyton*, 328

---

6 In *Gilliam*, *supra*, 61 F.3d at 1081-82, the Fourth Circuit noted that "[T]he right conferred by the Double Jeopardy Clause

F.Supp.2d 1103, 1105-06 (D. Hawaii 2004)("the court agrees with Petitioner that if petitioner is convicted in the second state court proceeding, overturning the conviction would not be a complete remedy, as Petitioner would have already been placed in jeopardy twice…As a result, in the instant case, Petitioner will incur irreparable injury if the state proceedings are not enjoined.")

In sum, because Petitioner has sought interlocutory appellate review in this Court of the denial of his double jeopardy dismissal motion, under the doctrine articulated in *Abney*, he is constitutionally entitled to have such interlocutory appellate review take place *before* any retrial occurs.

---

cannot be fully vindicated by post-conviction relief because it is a prohibition not only of multiple punishments, but also of multiple trials...Consequently, a stay of the state criminal proceedings is the only means to protect Petitioner's constitutional right."

Gilliam has a long procedural history, but the habeas petitioner in that case ultimately prevailed, and won a decision that his retrial was in fact barred by the Double jeopardy Clause. The stay of the state court trial was affirmed in *Gilliam v. Foster*, 63 F.3d 287 (4th Cir. 1995), *modified in other respects in Foster v. Gilliam*, 515 U.S. 1301 (1995)(Rehnquist, C.J.). After the District Court granted a writ of habeas corpus that decision was affirmed by the Court of Appeals in *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996), and the Supreme Court denied the prosecution's petition for *certiorari*, *Foster v. Gilliam*, 517 U.S. 1220 (1996).

Therefore, since the military judge declined to delay the retrial until after the appellate review has concluded, and stated his intention to commence the assembly of a court-martial panel on 9 October, 2007, this Court should issue an order staying further trial proceedings pending resolution of the *Renewed Petition for Extraordinary Relief*, thereby requiring the military judge to abide by the constitutional rule of *Abney*.

III. CONCLUSION

Petitioner respectfully submits that he has cured any procedural defect or obstacle there might have been to this Court's addressing the merits of his double jeopardy claim. He continues to respectfully assert that the military judge erred when he declared a mistrial over the accused's objection at the first trial, because there was no manifest necessity for taking such a course of action. The accused respectfully asks this Court to rule that the United States is prohibited from retrying him, and asks this Court to so direct the trial court.

In the interim, and in the most immediate sense, Petitioner urges this Court to grant his Application for a Stay of Trial Proceedings pending resolution on the merits of his motion to dismiss all charges and specifications.

DATED this 26th day of July, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By [signature]
James E. Lobsenz
Kenneth S. Kagan
Of Attorneys for Petitioner

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

First Lieutenant
EHRAN K. WATADA,
United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA, Lieutenant Colonel **JOHN M. HEAD,** Lieutenant General **JAMES DUBIK,** and Brigadier General **WILLIAM TROY,**

Respondents

INITIAL RESPONSE IN OPPOSITION TO THE PETITION FOR EXTRAORDINARY RELIEF AND FOR APPLICATION FOR STAY OF PROCEEDINGS

Army Misc. 20070834

Previous Writ: Army Misc. 20070535

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW the undersigned appellate government counsel, pursuant to Rules 20(e), 20.1, and 23 of this Honorable Court's Rules of Practice and Procedure and respond to Petitioner's Renewed Petition for Extraordinary Relief (hereinafter Second Petition); Brief in Support of the Renewed Petition (hereinafter Petitioner's Second Brief); and Petitioner's Second Application for a Stay of Proceedings. For the reasons stated herein, this Honorable Court should not issue a show cause order,[1] should summarily deny the Petition for Extraordinary Relief, and should deny petitioner's request for a stay of proceedings:

---

[1] C.C.A. R. 20(e).

PANEL No. 2

CIVILIAN ATT... ..Y COPY

1. Charges were originally preferred against petitioner on 5 July 2006 and referred for trial on 9 November 2006.[2] Petitioner was arraigned on 4 January 2007, and trial was held on 5-7 February 2007.[3] On 7 February 2007, the military judge declared a mistrial.[4] Charges were re-preferred and referred for trial on 23 February 2007.[5] On 17 May 2007, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition (hereinafter First Petition) and Application for Stay of Proceedings. On 18 May 2007, this Court issued an order to the Government to show cause why the writ should not be granted. The Court also granted petitioner a limited stay, allowing the trial court to proceed with pre-trial matters up to, but not including, assembly of the court-martial. On 29 June 2007 this Court denied petitioner's writ and lifted the stay.[6] The Court noted in its decision that petitioner filed his First Petition before seeking relief at the trial court.[7]

2. On 2 July 2007, petitioner filed a motion to dismiss for Double Jeopardy with the trial court. The substance of the motion was essentially the same as presented to this Court in the First and Second Petitions. On 11 July 2007, the military

---

[2] Charge Sheet - dated 5 July 2006 (Charge Sheet I).
[3] R. 124. Citations to the record are to the first set of proceedings. An authenticated copy of that record was provided to the Court, pursuant to its order, on 4 June 2007.
[4] R. 379.
[5] Charge Sheet - dated 23 February 2007 (Charge Sheet II).
[6] *Watada v. United States, et. al.*, Army Misc. 20070535 (Army Ct. Crim App. June 29, 2007) (unpublished)(Appendix A).
[7] *Id.*

judge issued written findings of fact and conclusions of law, denying petitioner's motion to dismiss.[8]

3. "The issuance of a writ under the All Writs Act is a 'drastic remedy which should only be invoked in those situations which are truly extraordinary.'"[9] "The issuance of such writs is generally not favored as they disrupt the orderly judicial process of trial on the merits and then appeal."[10] Therefore, the petitioner has an "extremely heavy burden" to justify the granting of a writ.[11] "Petitioner must show that the complained of actions *were more than 'gross error' and constitute a 'judicial usurpation of power.'*"[12]. "The ruling or action being challenged must be 'contrary to statute, settled case law, or valid regulation.'"[13] In fact, this Court's internal rules emphasize these principles of law:

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. Section 1651(a) is not a matter of right, but of discretion *sparingly exercised.* To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.[14]

---

[8] Appendix B.
[9] *McKinney v. Powell*, 46 M.J. 870 (Army Ct. Crim. App. 1997) (quoting *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993)).
[10] *McKinney*, 46 M.J. at 870.
[11] *Dew v. United States*, 48 M.J. 639, 648 (Army Ct. Crim. App. 1997).
[12] *McKinney*, 46 M.J. at 870 (emphasis added) (quoting *San Antonio Express-News v. Morrow*, 44 M.J. 706, 709 (A.F. Ct. Crim. App. 1996)) (emphasis added).
[13] *Id.* (quoting *Evans v. Kilroy*, 33 M.J. 730, 733 (A.F. Ct. Crim. App. 1991)).
[14] A.C.C.A. R. 20.1 (emphasis added).

4. Petitioner's complaints are not appropriate for appellate review at this time. While petitioner did litigate his motion to dismiss at the trial court, he is still not entitled to extraordinary relief. Petitioner asserts that the military judge abused his discretion,[15] and does not claim the military judge acted outside of his statutory or regulatory authority. "Mandamus does not run the gauntlet of reversible errors. Its office is not to control the decision of the trial court, *but to confine it to the sphere of its discretionary power.*"[16] The declaration of a mistrial and a motion to dismiss on grounds of double jeopardy are both reviewed for abuse of discretion.[17] Nowhere in his Second Petition or in his Second Brief does petitioner claim that the military judge usurped powers or acted outside the discretionary authority granted him by law. Petitioner is simply dissatisfied with the military judge's ruling, and wants his Article 66, UCMJ, review now instead of later.

5. Petitioner claims in his application for a stay of the proceedings that this Court *must* review his Double Jeopardy claim now,[18] under *Abney v. United States*.[19] Petitioner's reliance

---

[15] Second Petition at 28; Petitioner's Second Brief at 6 and 50.
[16] *Dew*, 48 M.J. at 648 (emphasis added) (quoting *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979) (internal modifications and quotation marks omitted).
[17] MCM, R.C.M. 915(a); *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003); *United States v. Bordelon*, 43 M.J. 531, 534 (Army Ct. Crim. App. 1995).
[18] Second Application for Stay of Proceedings at 5, 17.
[19] 431 U.S. 651 (1977).

on *Abney* is completely misplaced. In *Abney*, the Supreme Court was interpreting appellate jurisdiction for Article III appellate courts, as found in 28 U.S.C. §1291.[20] Article III appellate courts "shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."[21] In *Abney*, the Supreme Court was interpreting the term "final decisions" and found that a denial of a motion to dismiss on double jeopardy grounds was a "final decision" for purposes of 28 U.S.C. §1291.[22] The Supreme Court did not say that appellate courts "must" grant interlocutory review but that they "may" grant review.[23] The Supreme Court did not address 10 U.S.C. §866 or the discretionary nature of the All Writs Act. In fact, the Supreme Court reiterated that there is no constitutional right to an appeal.[24] Appellate jurisdiction and authority is a question of statute. In this case, the statute at hand is 28 U.S.C. 1651 (1992) (the All Writs Act), which allows for ***discretionary*** review by the service courts.[25] Petitioner's attempt to bootstrap *Abney* and the standard of review found in 28 U.S.C. §1291 is unsupportable.

---

[20] *Id.* at 653 ("We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision *within the meaning of 28 U.S.C. § 1291*, and thus immediately appealable.") (emphasis added).
[21] *Id.* (quoting 28 U.S.C. §1291).
[22] *Id.* at 659-60.
[23] "In determining that the courts of appeals *may* exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well." *Abney*, 431 U.S. at 662-63. The Court simply held that the issue must be "reviewable." *Id.* at 662. It did not say that appellate Courts were prohibited from exercising any discretion in granting review.
[24] *Id.* at 656.

6. The All Writs Act is not designed as an alternative to Article 66 appellate review. Every accused in a court-martial who loses a motion to dismiss believes the military judge was wrong. Every accused in a court-martial would prefer an appellate court review the judge's decision immediately, before the accused must go through the rest of his trial and possible punishment. However, unless the military judge has acted outside of his legal authority or there is some other "exceptional circumstance," an accused must wait for the proper time in which to file an appeal, pursuant to Article 66, UCMJ. Petitioner should not be allowed to circumvent Article 66 review and disrupt the orderly judicial process of an on-going trial on the merits; particularly for a second time. Petitioner fails to make even a *prima facie* showing of the "exceptional circumstance" that warrants the exercise of this Court's discretionary powers under the All Writs Act.[26]

---

[25] The Government would also point out that *Abney* was decided fifteen years before the All Writs Act, and Petitioner has cited no case applying Abney to a discretionary writ.

[26] If the Court issues an order for the Government to show cause why the Second Petition should not be granted, the Government will address the substantive merits of Petitioner's claims in its brief, pursuant to C.C.A. R. 20(e).

WHEREFORE, respondents respectfully request that this Honorable Court deny the petition for extraordinary relief sought by petitioner and deny the request for stay of the proceedings.

ADAM S. KAZIN
CPT, JA
Appellate Government Counsel
Lead Counsel

JAIRED D. STALLARD
CPT, JA
Appellate Government Counsel
Co-Counsel

STEVEN P. HAIGHT
Lieutenant Colonel, JA
Chief, Trial Counsel
Assistance Program

for JOHN W. MILLER II
Colonel, JA
Chief, Government Appellate
Division

CERTIFICATE OF SERVICE AND FILING

I hereby certify that I served a copy of the foregoing on Defense Appellate Division and this Honorable Court by hand and by UPS to James E. Lobsenz and Kenneth S. Kagan, Attorney's for Petitioner, 701 5TH AVE, SUITE 3600, SEATTLE, WA 98104 on 31 July 2007.

ANGELA RIDDICK
Paralegal Specialist
Government Appellate Division

RECEIVED
CLERK OF COURT
2007 JUL 31 A 11:04
US ARMY JUDICIARY

RECEIVED
2007 JUL 31 A 10:53
DEFENSE APPELLATE
DIVISION/USALSA

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MAHER, SULLIVAN, and HOLDEN
Appellate Military Judges

First Lieutenant EHREN K. WATADA, Petitioner
v.
The United States of America,
and
Lieutenant Colonel JOHN M. HEAD,
and
Lieutenant General JAMES DUBIK,
and
Brigadier General WILLIAM TROY,
Respondents

ARMY MISC 20070535

ORDER

Petitioner has filed a motion for extraordinary relief to enjoin his upcoming court-martial on former jeopardy grounds without first moving to dismiss under R.C.M. 907(b)(2)(C) and 915(c)(2). Under these circumstances, we deny petitioner's motion for extraordinary relief. Our order of 18 May 2007 is vacated.

DATE: 29 June 2007

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF: JALS-CR2
JALS-GA
Petitioner
Respondents

APPENDIX B

UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WASHINGTON

UNITED STATES v. 1LT EHREN K. WATADA U.S. Army HHC, I Corps Fort Lewis, WA 98433	)))))))))	**Ruling of the Court Defense Motion to Dismiss Based Upon Double Jeopardy**

During a motions session conducted on 6 July 2007 to litigate all motions, both parties were given the opportunity to present evidence on this matter and to make oral argument on the motion. Following are the findings of fact, discussion of the law, and ruling of the court. This ruling will be entered into the Record of Trial as the next Appellate Exhibit in order. In addition to the briefs of counsel, I have also considered the record of trial of *United States v. Watada*, tried 4 January and 5 through 7 February 2007 (*Watada* I).

I. Findings of Fact

I adopt the facts portion contained in the government's brief as the facts pertaining to this motion, by a preponderance of evidence.

II. Conclusions of Law

The defense has moved to dismiss the Charges and Specifications based upon double jeopardy arising out of the Court's granting a mistrial over the defense's objections. The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy of life or limb. Article 44(a), UCMJ, 10 U.S.C. § 844(a), applies the protections of the Fifth Amendment of the United States Constitution to servicemembers. When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when "there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Sloan*, 36 F.3d 386 (4th Cir., 1994) quoting *United States v. Perez*, 22 U.S. 579, 580, 6 L.Ed 165 (9 Wheat.) (1824). Additionally, Rules for Court-Martial (R.C.M.) 915(c)(2)(A) states that a mistrial will bar subsequent court-martial on the same charges if the mistrial was declared over the defense's objection and was an abuse of discretion on the part of the trial judge.

Appellate Exhibit XX[illegible]

While a trial judge need not make an explicit finding of manifest necessity, the Supreme Court has looked at whether the judge (1) "acted precipitately…[or] gave both defense counsel and the prosecutor full opportunity to explain their positions," (2) "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding; and (3) considered alternatives to declaring a mistrial. *Sloan*, 36 F.3d at 393, citing *United States v. Jorn*, 400 U.S. 470 (1971). As discussed below, none of the *Jorn* factors favor the defense.

This is a case that involves the breach of a pretrial agreement, Appellate Exhibit (hereafter AE) XXIII. As part of the pretrial agreement, the Court was required to accept the stipulation of fact, AE XXIV. While the court initially accepted the stipulation, it became clear at the opening of the defense's case that the accused, defense counsel, and ultimately trial counsel, did not understand the meaning and effect of the stipulation. Combined with the earlier ruling of the court on the lawfulness of the order to move, the stipulation admitted every fact and element needed to prove the offense of missing movement by design.

The elements of missing movement by design in this case are:

(1) That the accused was required in the course of duty to move with Flight Number BMYA91111173;

(2) That the accused knew of the prospective movement of the aircraft;

(3) That, on or about 22 June 2006, at or near Fort Lewis Washington, the accused missed the movement of the aircraft; and

(4) That the accused missed the movement through design.

In the stipulation, satisfying element (1), the accused was manifested on the aircraft in question and the court had previously ruled that the order, if given, was lawful. Para. 4, AE XXIV and AE XXI, *Watada* I. To satisfy element (2), the accused admitted he knew of the prospective movement because of numerous briefings and from numerous documents detailing the manifest requirements. Para. 4, AE XXIV. Satisfying element (3), the stipulation provided that the flight departed without the accused on it. *Id.* Last, element (4) is met in that same paragraph where the accused admitted that he intentionally missed the movement and, in paragraph (3) of the stipulation of fact, where the accused said to Sarah Olson, "So I've been given an order to deploy in late June. When I refuse, the chain of command will charge me and court-martial me." *Id.* Thus, the defense's contention that the stipulation of fact in the original trial was not a confessional stipulation as to the Specification of Charge I is without merit.

In *United States v. Bertelson*, 3 M.J. 314, 315-17 (C.M.A. 1977), the (then) Court of Military Appeals (COMA), now Court of Appeals for the Armed Forces (CAAF), held that a confessional stipulation was admissible if the military judge: 1) determines that the accused has knowingly, intelligently, and voluntarily consented to its admission, 2) conducts an inquiry similar to a guilty-plea inquiry, and 3) conducts a plea bargain inquiry. In *Bertelson*, the Court defined a confessional stipulation as "a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and purpose, it constitutes a *de facto* plea of guilty, i.e., it is the equivalent of entering a guilty plea to the charge." *Id.* at 315, n.2.

Rule for Courts-Martial (R.C.M.) 811(c) provides, "[b]efore accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission." The Discussion of the rule provides:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused, that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and the effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party, whether there are any agreements between the parties in connection with the stipulation and, if so, what the terms of such agreements are.
>
> A stipulation practically amounts to a confession when it is the equivalent of a guilty plea; that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stipulation. For example, a stipulation of fact that contraband drugs were discovered in a vehicle owned by the accused would normally practically amount to a confession if no other evidence were presented on the issue, but would not if the defense presented evidence to show that the accused was unaware of the presence of the drugs. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described above.

R.C.M. 811(c), Discussion. *See also United States v. Davis*, 50 M.J. 426, 429 (1999).

Finally, the Analysis to R.C.M. 811(c) offers this definition of a confessional stipulation: "[A] stipulation practically amounts to a confession when it amounts to a '*de facto*' plea of guilty, rather than simply one which makes out a *prima facie* case." MCM, A.21-50 (2005 ed.).

During the initial *Bertelson* inquiry, the accused fully admitted the government would not need to enter any additional evidence on the Specification of Charge I, and that he could be found guilty on the basis of the stipulation of fact alone. ROT at 127. Neither counsel objected nor commented at the time that it was not a confessional stipulation within the meaning of *Bertelson* or R.C.M. 811(c). However, once the defense proposed the mistake of law/fact instruction, it became obvious that there was a misunderstanding as to the nature of the stipulation and its uses. Simply put, the accused did not think he was entering into a stipulation that admitted every element of the offense when, in actuality, he had.

The defense proffers that the original civilian defense counsel was merely trying to "perfect his record" for appeal. While that may have some appeal at the surface level, the reality shows that the accused was trying to enter into a confessional stipulation while simultaneously contesting an element that, as a matter of fact and law, had already been decided. At this point, the Court, as it had after the civilian defense counsel set up matters inconsistent with the Stipulation of Fact after his opening (ROT at 261) reopened the inquiry pursuant to R.C.M. 811(b). Under *Bertelson*, the Court is required to ensure the accused entered into the stipulation "knowingly, intelligently, and voluntarily and consented to its admission." The Discussion of R.C.M. 811(b) further directs "the military judge should not accept a stipulation if there is any doubt of accused's or any other party's understanding of the nature and effect of the stipulation."

The accused made it clear that he had no intent to enter into a stipulation that admits every element of the offense charged in the Specification of Charge I. ROT at 363. The Government believed that the stipulation was also a confessional stipulation (ROT at 364), only changing its position when rejection of the stipulation of fact appeared inevitable. ROT at 366-367. The Court properly reconsidered its earlier admission of AE XXIV and rejected the stipulation of fact.

Once the court rejected the stipulation of fact, then the court must look to the pretrial agreement. Paragraph (5)(c) of AE XXIII provides that "the agreement may become null and void upon the occurrence of ...: (c) the refusal of the military judge to accept the Stipulation of Fact." The CAAF has held that "[a] pretrial agreement is created through the process of bargaining, similar to that used in creating any commercial contract. As a result, we look to the basic principles of contract law when interpreting pretrial agreements." *United States v. Acevedo*, 50 M.J. 169, 172 (1999). The term of the agreement is not ambiguous. The term was a material term to the pretrial agreement, because the agreement was for the government to dismiss two specifications in exchange for the defense stipulating to the matters contained in AE XXIV. The government dismissed Specifications 2 and 3 of Charge II. The Court rejected the stipulation, thus the defense was in breach of the pretrial agreement.

Turning to the *Jorn* factors concerning manifest necessity discussed above, a mistrial was the only reasonable alternative after the rejection of the stipulation of fact. First, looking to whether the court acted "precipitately," the Court gave each counsel whatever time they needed to discuss alternatives. Further, the court allowed each side multiple opportunities to state their positions, which only solidified the fact that the accused and his counsel did not understand the meaning and effect of the stipulation of fact.

The accused's desire and interest in having the trial concluded in a single proceeding was rendered impossible by the accused's breach of the pretrial agreement. In fact, the accused's actions would have necessitated a second trial on the merits of the two dismissed specifications. Further, had the accused been convicted of any of the charges at the first trial, those convictions could have been used as matters in aggravation in the second trial. Additionally, merely concerning itself with the accused's interests would have resulted in the ends of public justice being defeated. To leave the accused in the same position he would have been in without his breach of the pretrial agreement would put the government at a severe tactical disadvantage – being forced to rely on testimony that could be disregarded by the panel rather than relying on uncontroverted facts that could not be disregarded. While this is normally the way a trial is conducted, under the facts of this case, after the government opening and after the panel was informed that these were the uncontroverted facts of the case, the government would have to overcome an instruction to disregard all of the facts on the issues that were covered by the stipulation. This would have undoubtedly confused the panel.

Last, the alternatives to a mistrial would have been worse than the mistrial itself. First, there is no way to have reinstated the dismissed charges in mid-trial. *See* R.C.M. 904, Discussion. This would have resulted in a second trial of the accused with the results of the first trial being used as aggravation against the accused had he been convicted of any offense in the first trial. Second, even if the government had proceeded only on the Charges and Specifications that were still before the court, the stipulation contained very inflammatory statements made by the accused to the press that would not have been otherwise admissible. These statements could only have had an extremely prejudicial effect on the panel and no curative instruction would have been sufficient to cure the taint of the statements. Third, to ask the members to disregard the fact that the accused had agreed that all of the facts in the stipulation of fact were true, would place the accused in the light of being untruthful to the panel in such a way that the ordinary instruction to disregard the contents would have been insufficient to cure the problem.

Further, merely delaying the trial would not have fixed the problems. The trial is still tainted by the stipulation of fact. There is no guarantee that the government could have even obtained the necessary witnesses to authenticate statements in the stipulation of fact. If they had not been able to authenticate the videos or the reporters' statements, the prejudice to the accused only magnifies. Such powerful evidence would have been impossible for a panel to have disregarded.

Even if the accused would have benefited from the rejection of the stipulation, it is not in the interests of justice that an accused benefit from the breach of his pretrial agreement where the pretrial agreement is not unlawful. Last, to allow the case to continue where there was such a fundamental misunderstanding of the meaning and effect of the stipulation would only invite further error and call into question the fairness of the proceedings. The Court could not allow the proceedings to continue without irreparable harm occurring to either party.

There was a manifest necessity to declare a mistrial under the facts of this case.

III. Ruling of the Court:

The defense motion is DENIED.

Done this 11th day of July, at Fort Lewis, Washington.

JOHN M. HEAD
LTC, JA
Circuit Judge

UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WASHINGTON

UNITED STATES v. 1LT EHREN K. WATADA U.S. Army HHC, I Corps Fort Lewis, WA 98433	)))))))))	**Ruling of the Court Defense Motion to Dismiss Based Upon Double Jeopardy**

During a motions session conducted on 6 July 2007 to litigate all motions, both parties were given the opportunity to present evidence on this matter and to make oral argument on the motion. Following are the findings of fact, discussion of the law, and ruling of the court. This ruling will be entered into the Record of Trial as the next Appellate Exhibit in order. In addition to the briefs of counsel, I have also considered the record of trial of *United States v. Watada*, tried 4 January and 5 through 7 February 2007 (*Watada* I).

I. Findings of Fact

I adopt the facts portion contained in the government's brief as the facts pertaining to this motion, by a preponderance of evidence.

II. Conclusions of Law

The defense has moved to dismiss the Charges and Specifications based upon double jeopardy arising out of the Court's granting a mistrial over the defense's objections. The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy of life or limb. Article 44(a), UCMJ, 10 U.S.C. § 844(a), applies the protections of the Fifth Amendment of the United States Constitution to servicemembers. When a mistrial is declared over a criminal defendant's objection, retrial is permitted only when "there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Sloan*, 36 F.3d 386 (4th Cir., 1994) quoting *United States v. Perez*, 22 U.S. 579, 580, 6 L.Ed 165 (9 Wheat.) (1824). Additionally, Rules for Court-Martial (R.C.M.) 915(c)(2)(A) states that a mistrial will bar subsequent court-martial on the same charges if the mistrial was declared over the defense's objection and was an abuse of discretion on the part of the trial judge.

Appellate Exhibit XXVII (27)

While a trial judge need not make an explicit finding of manifest necessity, the Supreme Court has looked at whether the judge (1) "acted precipitately…[or] gave both defense counsel and the prosecutor full opportunity to explain their positions," (2) "accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding; and (3) considered alternatives to declaring a mistrial. *Sloan*, 36 F.3d at 393, citing *United States v. Jorn*, 400 U.S. 470 (1971). As discussed below, none of the *Jorn* factors favor the defense.

This is a case that involves the breach of a pretrial agreement, Appellate Exhibit (hereafter AE) XXIII. As part of the pretrial agreement, the Court was required to accept the stipulation of fact, AE XXIV. While the court initially accepted the stipulation, it became clear at the opening of the defense's case that the accused, defense counsel, and ultimately trial counsel, did not understand the meaning and effect of the stipulation. Combined with the earlier ruling of the court on the lawfulness of the order to move, the stipulation admitted every fact and element needed to prove the offense of missing movement by design.

The elements of missing movement by design in this case are:

(1) That the accused was required in the course of duty to move with Flight Number BMYA91111173;

(2) That the accused knew of the prospective movement of the aircraft;

(3) That, on or about 22 June 2006, at or near Fort Lewis Washington, the accused missed the movement of the aircraft; and

(4) That the accused missed the movement through design.

In the stipulation, satisfying element (1), the accused was manifested on the aircraft in question and the court had previously ruled that the order, if given, was lawful. Para. 4, AE XXIV and AE XXI, *Watada* I. To satisfy element (2), the accused admitted he knew of the prospective movement because of numerous briefings and from numerous documents detailing the manifest requirements. Para. 4, AE XXIV. Satisfying element (3), the stipulation provided that the flight departed without the accused on it. *Id.* Last, element (4) is met in that same paragraph where the accused admitted that he intentionally missed the movement and, in paragraph (3) of the stipulation of fact, where the accused said to Sarah Olson, "So I've been given an order to deploy in late June. When I refuse, the chain of command will charge me and court-martial me." *Id.* Thus, the defense's contention that the stipulation of fact in the original trial was not a confessional stipulation as to the Specification of Charge I is without merit.

In *United States v. Bertelson*, 3 M.J. 314, 315-17 (C.M.A. 1977), the (then) Court of Military Appeals (COMA), now Court of Appeals for the Armed Forces (CAAF), held that a confessional stipulation was admissible if the military judge: 1) determines that the accused has knowingly, intelligently, and voluntarily consented to its admission, 2) conducts an inquiry similar to a guilty-plea inquiry, and 3) conducts a plea bargain inquiry. In *Bertelson*, the Court defined a confessional stipulation as "a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and purpose, it constitutes a *de facto* plea of guilty, i.e., it is the equivalent of entering a guilty plea to the charge." *Id.* at 315, n.2.

Rule for Courts-Martial (R.C.M.) 811(c) provides, "[b]efore accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission." The Discussion of the rule provides:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused, that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and the effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party, whether there are any agreements between the parties in connection with the stipulation and, if so, what the terms of such agreements are.
>
> A stipulation practically amounts to a confession when it is the equivalent of a guilty plea; that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stipulation. For example, a stipulation of fact that contraband drugs were discovered in a vehicle owned by the accused would normally practically amount to a confession if no other evidence were presented on the issue, but would not if the defense presented evidence to show that the accused was unaware of the presence of the drugs. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described above.

R.C.M. 811(c), Discussion. *See also United States v. Davis*, 50 M.J. 426, 429 (1999).

Finally, the Analysis to R.C.M. 811(c) offers this definition of a confessional stipulation: "[A] stipulation practically amounts to a confession when it amounts to a '*de facto*' plea of guilty, rather than simply one which makes out a *prima facie* case." MCM, A.21-50 (2005 ed.).

During the initial *Bertelson* inquiry, the accused fully admitted the government would not need to enter any additional evidence on the Specification of Charge I, and that he could be found guilty on the basis of the stipulation of fact alone. ROT at 127. Neither counsel objected nor commented at the time that it was not a confessional stipulation within the meaning of *Bertelson* or R.C.M. 811(c). However, once the defense proposed the mistake of law/fact instruction, it became obvious that there was a misunderstanding as to the nature of the stipulation and its uses. Simply put, the accused did not think he was entering into a stipulation that admitted every element of the offense when, in actuality, he had.

The defense proffers that the original civilian defense counsel was merely trying to "perfect his record" for appeal. While that may have some appeal at the surface level, the reality shows that the accused was trying to enter into a confessional stipulation while simultaneously contesting an element that, as a matter of fact and law, had already been decided. At this point, the Court, as it had after the civilian defense counsel set up matters inconsistent with the Stipulation of Fact after his opening (ROT at 261) reopened the inquiry pursuant to R.C.M. 811(b). Under *Bertelson*, the Court is required to ensure the accused entered into the stipulation "knowingly, intelligently, and voluntarily and consented to its admission." The Discussion of R.C.M. 811(b) further directs "the military judge should not accept a stipulation if there is any doubt of accused's or any other party's understanding of the nature and effect of the stipulation."

The accused made it clear that he had no intent to enter into a stipulation that admits every element of the offense charged in the Specification of Charge I. ROT at 363. The Government believed that the stipulation was also a confessional stipulation (ROT at 364), only changing its position when rejection of the stipulation of fact appeared inevitable. ROT at 366-367. The Court properly reconsidered its earlier admission of AE XXIV and rejected the stipulation of fact.

Once the court rejected the stipulation of fact, then the court must look to the pretrial agreement. Paragraph (5)(c) of AE XXIII provides that "the agreement may become null and void upon the occurrence of ...: (c) the refusal of the military judge to accept the Stipulation of Fact." The CAAF has held that "[a] pretrial agreement is created through the process of bargaining, similar to that used in creating any commercial contract. As a result, we look to the basic principles of contract law when interpreting pretrial agreements." *United States v. Acevedo*, 50 M.J. 169, 172 (1999). The term of the agreement is not ambiguous. The term was a material term to the pretrial agreement, because the agreement was for the government to dismiss two specifications in exchange for the defense stipulating to the matters contained in AE XXIV. The government dismissed Specifications 2 and 3 of Charge II. The Court rejected the stipulation, thus the defense was in breach of the pretrial agreement.

Turning to the *Jorn* factors concerning manifest necessity discussed above, a mistrial was the only reasonable alternative after the rejection of the stipulation of fact. First, looking to whether the court acted "precipitately," the Court gave each counsel whatever time they needed to discuss alternatives. Further, the court allowed each side multiple opportunities to state their positions, which only solidified the fact that the accused and his counsel did not understand the meaning and effect of the stipulation of fact.

The accused's desire and interest in having the trial concluded in a single proceeding was rendered impossible by the accused's breach of the pretrial agreement. In fact, the accused's actions would have necessitated a second trial on the merits of the two dismissed specifications. Further, had the accused been convicted of any of the charges at the first trial, those convictions could have been used as matters in aggravation in the second trial. Additionally, merely concerning itself with the accused's interests would have resulted in the ends of public justice being defeated. To leave the accused in the same position he would have been in without his breach of the pretrial agreement would put the government at a severe tactical disadvantage – being forced to rely on testimony that could be disregarded by the panel rather than relying on uncontroverted facts that could not be disregarded. While this is normally the way a trial is conducted, under the facts of this case, after the government opening and after the panel was informed that these were the uncontroverted facts of the case, the government would have to overcome an instruction to disregard all of the facts on the issues that were covered by the stipulation. This would have undoubtedly confused the panel.

Last, the alternatives to a mistrial would have been worse than the mistrial itself. First, there is no way to have reinstated the dismissed charges in mid-trial. *See* R.C.M. 904, Discussion. This would have resulted in a second trial of the accused with the results of the first trial being used as aggravation against the accused had he been convicted of any offense in the first trial. Second, even if the government had proceeded only on the Charges and Specifications that were still before the court, the stipulation contained very inflammatory statements made by the accused to the press that would not have been otherwise admissible. These statements could only have had an extremely prejudicial effect on the panel and no curative instruction would have been sufficient to cure the taint of the statements. Third, to ask the members to disregard the fact that the accused had agreed that all of the facts in the stipulation of fact were true, would place the accused in the light of being untruthful to the panel in such a way that the ordinary instruction to disregard the contents would have been insufficient to cure the problem.

Further, merely delaying the trial would not have fixed the problems. The trial is still tainted by the stipulation of fact. There is no guarantee that the government could have even obtained the necessary witnesses to authenticate statements in the stipulation of fact. If they had not been able to authenticate the videos or the reporters' statements, the prejudice to the accused only magnifies. Such powerful evidence would have been impossible for a panel to have disregarded.

Even if the accused would have benefited from the rejection of the stipulation, it is not in the interests of justice that an accused benefit from the breach of his pretrial agreement where the pretrial agreement is not unlawful. Last, to allow the case to continue where there was such a fundamental misunderstanding of the meaning and effect of the stipulation would only invite further error and call into question the fairness of the proceedings. The Court could not allow the proceedings to continue without irreparable harm occurring to either party.

There was a manifest necessity to declare a mistrial under the facts of this case.

III. Ruling of the Court:

The defense motion is DENIED.

Done this 11th day of July, at Fort Lewis, Washington.

JOHN M. HEAD
LTC, JA
Circuit Judge